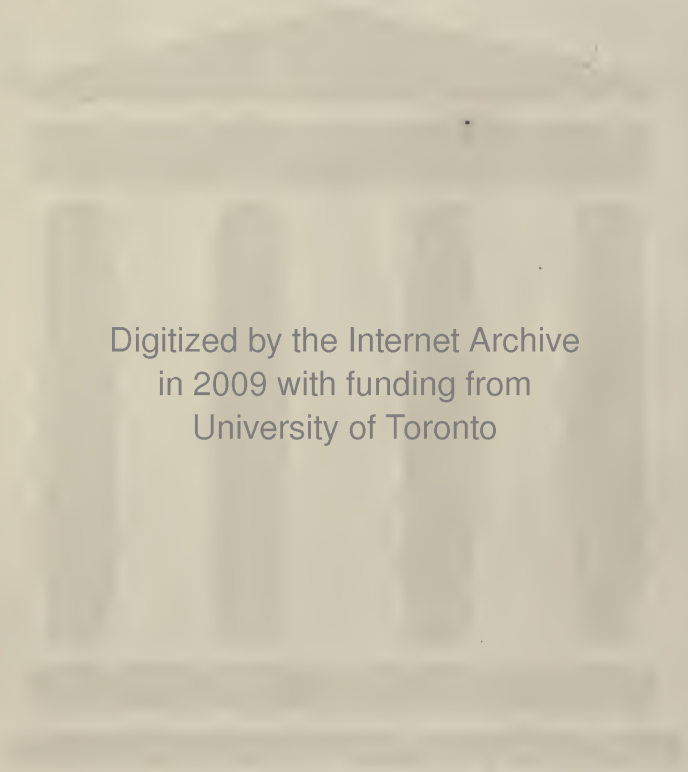


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NEW
COMMENTARIES
ON THE
LAWS OF ENGLAND.

(PARTLY FOUNDED ON BLACKSTONE.)

BY
HENRY JOHN STEPHEN,
SERJEANT AT LAW.

“For hoping well to deliver myself from mistaking, by the order and perspicuous
“expressing of that I do propound, I am otherwise zealous and affectionate to recede
“as little from antiquity, either in terms or opinions, as may stand with truth, and the
“proficiency of knowledge.”—*Lord Bac. Adv. of Learning.*

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NEW COMMENTARIES
ON
THE LAWS OF ENGLAND.

BOOK IV.
OF PUBLIC RIGHTS.

PART I.
OF THE CIVIL GOVERNMENT—(*continued.*)

CHAPTER IX.
OF THE NOBILITY AND OTHER RANKS.

IT has been shown in a former place (a), that the sovereign is the fountain of honour, it being a part of his prerogative to confer titles of honour (or, in the language of the law, *dignities*,) and other personal distinctions, upon such of his subjects as may appear to deserve those marks of royal favour. Among these dignities, the principal is that of peerage, of which we had occasion to speak when the constitution of parliament was under discussion. We then took some view of the peerage, or lords of parliament, considered as a branch of the legislature. But, besides this, they constitute a distinct order of persons, individually elevated above the rest of their fellow-subjects by superior

(a) Vide sup. vol. ii. p. 533 ; and see 4 Inst. 363.

rank and privilege; and in that sense are termed the *nobility* of the realm, as distinguished from the other order of the state, viz. the *commonalty*, to which all persons alike belong (whatever may be the difference of rank and station which in other respects may exist between them), who are not of the nobility or peerage,—there being, in a legal sense, but two general divisions of rank in this country, that of peers (or nobles) and commoners, including in the latter even the children of the nobility. First then, as to the nobility, or peerage, it is to be observed, that all degrees of nobility [are not of equal antiquity. Those now in use are dukes, marquesses, earls, viscounts, and barons (*b*).

1. A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank, his being the first title of dignity after the royal family (*c*). Among the Saxons, the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called *hepctoga* (*d*); and in the laws of Henry I., as translated by Lambard, we find them called *heretochii*.] But after the Norman conquest, though the kings themselves continued for many generations *dukes* of Normandy, they did not honour any subjects with the title of duke till the time of Edward III., who [in the eleventh year of his reign created his son, Edward the Black Prince, Duke of Cornwall; and many, of the royal family especially, were afterwards raised to the like honour. However, in the reign of Queen Elizabeth, A. D. 1572 (*e*), the whole order became utterly extinct; but it was revived about fifty

(*b*) For the original of these titles on the continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Titles of Honour*.

(*c*) Camden's *Brit. tit. Ordines*.

(*d*) This is apparently derived from

the same root as the German *herzog*, the antient appellation of dukes in that country. Seld. *Tit. Hon.* 2, 1, 22.

(*e*) Camden's *Britan. tit. Ordines*; Spelman, *Gloss.* 191.

[years afterwards by her successor, who was remarkably prodigal of honours, in the person of George Villiers, Duke of Buckingham.

2. A *marquess*, *marchio*, is the next degree of nobility. His office formerly] (for dignity and office were at one time more generally in combination than at present) [was to guard the frontiers and limits of the kingdom, which were called the marches, from the Teutonic word *marche*, a limit; such as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons who had command there were called lords marchers or marquesses, whose authority] in Wales [was abolished by statute 27 Hen. VIII. c. 27, though the title had long before been made a mere ensign of honour, Robert Vere, Earl of Oxford, being created Marquess of Dublin by Richard II. in the eighth year of his reign (*f*).]

3. An *earl* is a title of nobility so antient that its original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons there were *eorls* and [*ealdormen*, quasi elder men, signifying the same as *senior* or *senator* among the Romans,] and synonymous, or nearly so, with *eorls*; and that these *ealdormen* were also called [*schiremen*, because they had each of them the civil government of a several division or shire. In Latin *earls* are called *comites* (a title first used in the empire), from being the king's attendants: "*a societate nomen sumpserunt, regis enim tales sibi associant*" (*g*). After the Norman conquest they were for some time called *counts* or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The name of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county, which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs and com-

(*f*) 2 Inst. 5.

(*g*) Bracton, l. 1, c. 8; Flet. l. 1, c. 5.

[missions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him “ trusty and well-beloved *cousin*,” an appellation as antient as the reign of Henry IV., who, being either by his wife, his mother, or his sisters, actually related or allied to every earl then in the kingdom, artfully and constantly acknowledged that connexion in all his letters and other public acts; from whence the usage has descended to his successors, though the reason has long ago failed.

4. The name of *vice-comes* or *viscount* was afterwards made use of as an arbitrary title of honour, without any shadow of office pertaining to it (*h*), by Henry VI., when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of Viscount Beaumont, which was the first instance of the kind (*i*).

5. A *baron's* is the most general and universal title of nobility; for] antiently [every one of the peers of superior rank had also a barony annexed to his other titles (*h*).] At the time of the Conquest, indeed, the temporal nobility consisted only of earls and barons, and by whatever right the earls and the mitred clergy before that time might have attended the general council of the nation, it clearly appears that they afterwards sat in parliament in the character of barons only (*l*). [But it hath sometimes happened, that when an antient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony; and there are also modern instances where earls and viscounts have been created without annexing a barony to their other honours; so that now the rule doth not hold universally that all peers are barons.

(*h*) The word *vice-comes*, however, as has been just stated, is the Latin term also applied by law to the sheriff; an officer of whom we shall speak hereafter.

(*i*) 2 Inst. 5.

(*h*) 2 Inst. 5, 6.

(*l*) Christian's Blackstone, vol. i. p. 398.

[The original and antiquity of baronies have occasioned great inquiries among our English antiquaries.] The most probable opinion seems to be that to which Blackstone inclines, that the barons were the same as the lords of manors or other estates holding of the king *in capite* (m); for it may be collected from King John's *Magna Carta* (n), that originally all lords or owners of estates that so held were called barons, and [had seats in the great council or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the] principal tenants, called the [greater barons, in person; leaving the small ones to be summoned by the sheriff, and, as it is said, to sit by representation in another house, which gave rise to the separation of the two houses of parliament (o). By degrees the title came to be confined to the greater barons or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ in respect of the tenure of their lands or baronies, till Richard II. first made it a mere title of honour by conferring it on divers persons by his letters patent (p).

Having made this short inquiry into the original of our several degrees of nobility, we shall next consider the manner in which they may be created. The right of peerage seems] (as above explained) [to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign; and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of suc-

(m) Spelm. Gloss. Baronia.

(n) Vide sup. vol. ii. p. 489.

(o) Gilb. Hist. of Exch. c. 3; Seld. Tit. of Hon. 2, 5, 21. Vide sup.

vol. ii. p. 350, and the extract from the Great Charter there cited *in notis*.

(p) Co. Litt. 9 b; Seld. Jan. Angl. 2, § 66.

[cession to certain antient baronies annexed, or supposed to be annexed, to their episcopal lands (*g*); and thus, in 11 Hen. VI., the possession of the castle of Arundel was adjudged to confer an earldom] *by tenure* [on its possessor (*r*);] of which mode of title to a peerage there are several other examples on record (*s*). [But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament;] and the alienation of the territorial possessions of a peer had no longer, except in the rare cases referred to, the effect of transferring the peerage itself; and this dignity may now be created without even connecting it nominally with any particular locality (*t*), though it has remained usual in creating a peer to name him baron, earl, or the like, of some specified place.

[Peers are now created either by writ or by patent: for those who claim by prescription must suppose either a writ or patent made to their ancestors, though by length of time it is lost. The creation by writ or the king's letter, is a summons to attend the house of peers, by the style and title of that barony, which the king is pleased to confer: that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more antient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords; and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parlia-

(*g*) Vide sup. vol. ii. p. 358.

(*r*) Seld. Tit. of Hon. b. 2, c. 9, s. 5.

(*s*) Cruise, Dig. vol. iii. p. 185.

It is stated in the Fourth Report of the Lords' Committees on Peerages, p. 338, that there were then (in 1825) two dignities, that of Earl of Arundel and Baron of Abergavenny, which had been claimed as dignities *by tenure*, but that the honour of Arundel and

territory of Abergavenny were both entailed by act of parliament, so that neither could be barred; yet that, on failure of issue under the entail, persons in reversion would be intitled: so that there might be a question hereafter as to the incidents of these peerages, considered as peerages *by tenure*.

(*t*) Cruise, Dig. vol. iii. p. 219.

[ments, to evidence an hereditary barony (*u*): and therefore the most usual, because the surest, way is to grant the dignity by patent, which enures to a man] and his descendants, [according to the limitations thereof, though he never himself makes use of it (*x*). Yet it is frequent to call up the eldest son of a peer to the House of Lords by a writ of summons in the name of his father's barony: because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather (*y*). Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity to him and] the heirs general (that is, male and female (*z*)) of his body [without any words to that purport in the writ (*a*); but in letters patent there must be words to direct the inheritance, else the dignity enures only to the grantee for life (*b*). For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all.] A peerage, however, is usually conferred by the letters patent, on the grantee and the heirs male of his body (*c*); though it may be on the grantee and the heirs female of his body, or on him and the heirs general of his body; or it may be made to descend to some particular heirs, as where it is

(*u*) Whitelocke of Parl. ch. 114.

(*x*) Co. Litt. 16 b.

(*y*) Where the father's barony is limited by patent to him and the heirs male of his body, and his eldest son is called up to the House of Lords by writ with the title of this barony, the writ in this case will not create a fee or a general estate tail, so as to make a female capable of inheriting the title, but upon the death of the father the two titles unite, or become one and the same. Case of the claim of the barony of Sidney of Penshurst disallowed. *Dom. Proc.* 17 June, 1782.—Christian's Blackstone.

(*z*) Cruise, Dig. vol. iii. p. 223;

Devon Peerage case, 5 Bligh, N. S. 313; Lord Coke (Co. Litt. 9, 16), and after him Blackstone (vol. i. p. 401), says "to him and his *heirs*;" but this must be understood heirs of the body; for it is clear with respect to dignities created without words of express limitation, that they are not descendible to the heirs collateral.

(*a*) The mode of descent, however, may by express words in the writ of summons be confined to males; Cru. Dig. vol. iii. p. 205.

(*b*) Co. Litt. 9, 16.

(*c*) Cru. Dig. vol. iii. p. 218, 245; Devon Peerage case, ubi sup.

limited to [a man, and the heirs male of his body by Elizabeth, his present lady, and not to such heirs by any former or future wife.] It may also be limited to the grantee and his heirs collateral as well as lineal; and if a peerage be granted to a man “*and his heirs male*,” it will descend, in default of heirs male to his body, to his heirs male collateral (*d*). The right of primogeniture takes place between males in the descent of dignities (*e*); but it is otherwise as to females: for if a man holds a peerage to him and the heirs of his body, and dies, leaving only daughters, the dignity is in suspense or abeyance (as we had occasion to remark in a former part of this work) (*f*), and the sovereign may bestow it on which of them he pleases.

[Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counsellors of the crown; both of which we have before considered. And first we must observe, that in cases] of treason and other felony [a nobleman shall be tried by his peers. The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would, moreover, be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *magna carta*, c. 29.] In mere misdemeanors, however, such as libel, perjury, or conspiracy, this rule is not observed, and a peer is tried (like a commoner) by jury. And [it is said, that this rule does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies, which they hold *jure ecclesiæ*, yet are not ennobled in blood, and consequently not peers with the nobility (*g*). As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor Duchess of Gloucester, wife to

(*d*) Devon Peerage case, ubi sup.

(*e*) Cru. Dig. vol. iii. p. 244.

(*f*) Vide sup. vol. i. p. 373.

(*g*) 3 Inst. 30, 31.

[the lord protector, was accused of treason, and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of Cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI. c. 9, which declares (*h*) the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers,] but communicates no rank to her husband (*i*). [If she be only noble by marriage, then, by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost (*h*). Yet if a duchess dowager marries a baron, she continues a duchess still; for all the nobility are *pares*, and therefore it is no degradation (*l*).] And by courtesy, or the usage of society, all peeresses, though married to commoners, are ordinarily addressed by their former title. [A peer, or peeress, either in her own right or by marriage, cannot be arrested in civil cases (*m*);] but they have no exemption from arrest, in cases of treason, felony, or actual breach of the peace (*n*). [They have also many peculiar privileges annexed to their

(*h*) Isabel Countess of Rutland's case, Moor, 769; 2 Inst. 50; *ibid.* 6 Rep. 53; Staundf. P. C. 152.

(*i*) Harg. Co. Litt. 326 b; 29 b, n. (1).

(*k*) Dyer, 79; Co. Litt. 16.

(*l*) Co. Litt. 16 b; 2 Inst. 50. Mr. Hargrave, in a note on the passage in Co. Litt. observes that it is laid down in Ow. 82, and Bend. 37. S. C. that she takes in such case the dignity of the second husband; and Mr. Cruise states, that, at the coronation of King George III. the Duchess Dowager of Leeds, then the wife of Lord Portmore, claimed to walk as a Duchess; but it was refused; Cruise, Dig. vol. iii. p. 220.

(*m*) Finch, L. 355; 1 Ventr. 298.

(*n*) 4 Inst. 24; 2 Wils. 159; 11 Harg. St. Tr. 305. The privilege called *benefit of clergy* (*privilegium clericale*), by which all clerks in orders were discharged from many kinds of capital felonies, and which was afterwards extended to laymen in general, only on condition of their being burnt in the hand, fined, or whipped, was extended to peers, free from such condition; but it is now abolished altogether by 7 & 8 Geo. 4, c. 28; and transportation, imprisonment, or (in the case of males) whipping, imposed on all persons committing offences formerly clergyable.

[peerage in the course of judicial proceedings. A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary jurymen, but upon his honour (*o*); he answers also to bills in chancery upon his honour, and not upon his oath (*p*); but, when he is examined as a witness either in civil or criminal cases, he must be sworn (*q*): for the respect which the law shows to the honour of a peer does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis* (*r*). The honour of peers is, however, so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum*, and subjected to peculiar punishments by divers antient statutes (*s*).] With respect to the dignity and privileges of peerage here mentioned, it is lastly to be observed, that they are not extended by the law to foreign peers, who are in this country no more than commoners; but that they belong, since the Scottish and Irish unions, to all peers of Scotland and Ireland, with the exception of such Irish peers only as are members of the house of commons (*t*).

[A peer cannot] surrender or [lose his nobility, but by death or attainder; though there was an instance in the reign of Edward IV. of the degradation of George Neville, Duke of Bedford, by act of parliament (*u*), on account of his poverty, which rendered him unable to support his dignity (*x*). But this is a singular instance, which

(*o*) 2 Inst. 49.

(*p*) 1 P. Wms. 146.

(*q*) *Meers v. Lord Stourton*, Salk. 512. If he is examined as a witness in the high court of parliament, he must be sworn. The Bishop of Oxford was sworn in the impeachment of Lord Macclesfield, and Lord Mansfield (then Lord Stormont) in that of Mr. Hastings.—Christian's Blackstone, vol. i. p. 401.

(*r*) Earl of Lincoln's case, Cro. Car. 64.

(*s*) 3 Edw. 1, c. 34; 2 Ric. 2, st. 1, c. 5; 12 Ric. 2, c. 11.

(*t*) 39 & 40 Geo. 3, c. 67.

(*u*) 4 Inst. 355.

(*x*) The preamble to the act is remarkable: "Forasmuch as oftentimes "it is seen, that when any lord is "called to high estate, and hath no "convenient livelihood to support the

[serves at the same time, by having happened, to show the power of parliament; and, by having happened but once, to show how tender the parliament hath been in exerting so high a power. It hath been said indeed (y), that if a baron wastes his estate, so that he is not able to support the degree, the *king* may degrade him; but it is expressly held by later authorities (z), that a peer cannot be degraded but by *act of parliament*.

The commonalty, like the nobility, are divided into several degrees; but, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so] in the same sense [the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility (a).

The first name of dignity, next beneath a peer, was antiently that of *vidames*, *vice-domini*, *vavasores*, or *valvasors* (b): who are mentioned by our antient lawyers (c) as *virī magnæ dignitatis*; and Sir Edward Coke (d) speaks highly of them. Yet they are now quite obsolete; and our legal antiquaries are not agreed upon even their original or antient office.

Now therefore the first personal dignity, after the nobility, is a *knight* of the order of St. George, or of the *Garter*; first instituted by Edward III. A.D. 1344 (e). Next (but not till after certain *official* dignities, as privy counsellors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the King's Bench, the master of the rolls,) the vice-chancellors, [and the other English judges,) follows a *knight banneret*; who indeed by statutes

"same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, embracery, and maintenance to be had; to the great trouble of all such countries where such estate shall happen to be; therefore," &c. Ibid.

(y) Moor, 768.

(z) Earl of Shrewsbury's case, 12 Rep. 107; 12 Mod. 56.

(a) 2 Inst. 29.

(b) Camden, Britan. tit. Ordines.

(c) Bracton, l. 1, c. 8.

(d) 2 Inst. 667.

(e) Seld. Tit. of Hon. b. 2, c. 5, 40, 41.

[5 Ric. II. st. 2, c. 4, and 14 Ric. II. c. 11, is ranked next after barons: and his precedence before the younger sons of viscounts was confirmed to him by order of King James I., in the tenth year of his reign (*f*). But, in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war (*g*). Else he ranks after *baronets*, who are the next order; which title is a dignity of inheritance, created by letters patent, and usually descendible to the issue male. It was first instituted by King James I. A. D. 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland (*h*); for which reason all baronets have the arms of Ulster superadded to their family coat (*i*). Next follow *knights of the bath*; an order instituted by King Henry IV., and revived by King George I. They are so called from the ceremony of bathing the night before their creation. The last of these inferior nobility are *knights bachelors* (*k*); the most antient, though the lowest, order of knighthood amongst us; for we have an instance (*l*) of King Alfred's conferring this order on his son Athelstan. The custom of the antient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's house-

(*f*) Seld. Tit. of Hon. 2, 11, 3.

(*g*) 4 Inst. 6.

(*h*) One hundred gentlemen advanced each one thousand pounds; for which this title was conferred upon them. 2 Rap. 185, fo.—Christian's Blackstone, vol. i. p. 403.

(*i*) The arms of Ulster are, a hand *gules*, or a bloody hand in a field *argent*.—Christian's Blackstone, *ibid*.

(*k*) The most probable derivation of the word bachelor is from *bas* and *chevalier*, an inferior knight; and thence latinized into the barbarous

word *baccalaureus*.—Ducange, *Bac*.

The lowest graduates in the universities are styled *bachelors*, and were, till lately, addressed with sir before their surname; as in Latin they are still called *domini*. It is somewhat remarkable, that whilst this feudal word has long been appropriated to single men, another feudal term of higher dignity, viz. baron, should in legal language, be applied to those who are married.—Christian's Blackstone, *ibid*.

(*l*) Will. Malmsh. lib. 2.

[hold; after it, as part of the community (*m*). Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati*: *aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback: for it is observable (*n*) that almost all nations call their knights by some appellation derived from a horse (*o*). They are also called in our law *milites*, because they formed a part of the royal army, in virtue of their feudal tenures; one condition of which was, that every one who held a knight's fee immediately under the crown, which in Edward the Second's time (*p*) amounted to 20*l.* *per annum*, was obliged to be knighted, and attend the king in his wars, or fine for his non-compliance. The exertion of this prerogative as an expedient to raise money in the reign of Charles I., gave great offence, though warranted by law, and the recent example of Queen Elizabeth; but it was by the statute 16 Car. I. c. 16, abolished; and this kind of knighthood has since that time fallen into great disregard.

These, Sir Edward Coke says (*q*), are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last (*r*), the

(*m*) Tac. de Morib. Germ. 13.

(*n*) Camd. *ibid.*; Co. Litt. 74.

(*o*) It does not appear that the English word *knight* has any reference to a horse; for knight, or *cnicht* in the Saxon, signified *puer*, *servus*, or attendant; 2 Seld. Tit. Hon. c. 5, s. 33.—Christian's Blackstone, vol. i. p. 464.

(*p*) Stat. de Milit., 1 Ed. 2; 2 Inst. 594.

(*q*) 2 Inst. 667.

(*r*) The rules of precedence in England may be reduced to the fol-

lowing table, in which those marked * are entitled to the rank here allotted them, by statute 31 Hen. 8, c. 10; marked †, by statute 1 W. & M. c. 21; marked ‖, by letters patent 9, 10, & 14 Jac. 1, which see in Seld. Tit. of Hon. ii. 5, 46, and ii. 11, 3; marked ‡, by antient usage and established custom; for which see, among others, Camden's Britannia, Tit. Ordines; Milles's Catalogue of Honour, edit. 1610; and Chamberlayne's Present State of England, b. 3, ch. 3.

TABLE OF PRECEDENCE.

- * The king's children and grandchildren.
- * ——— brethren.

- * The king's uncles
- * ——— nephews.
- * Archbishop of Canterbury.

[heralds rank all colonels, serjeants at law, and doctors in the three learned professions.

* Lord Chancellor or Keeper, if a baron.	Chancellor of the Exchequer.
* Archbishop of York.	Chancellor of the Duchy.
* Lord Treasurer,	Chief Justice of the King's Bench.
* Lord President of the Council,	Master of the Rolls.
* Lord Privy Seal,	Chief Justice of the Common Pleas.
* Lord Great Chamberlain.	Chief Baron of the Exchequer.
But see private stat.	The three Vice Chancellors *.
1 Geo. 1, c. 3.	Judges and Barons of the Coif.
* Lord High Constable,	Judges of the Court of Review in Bankruptcy †.
* Lord Marshal,	Knights Bannerets, royal.
* Lord Admiral,	Viscounts' younger sons.
* Lord Steward of the Household,	Barons' younger sons.
* Lord Chamberlain of the Household,	Baronets.
* Dukes.	Knights Bannerets.
* Marquesses.	‡ Knights of the Bath.
† Dukes' eldest sons.	‡ Knights Bachelors.
* Earls.	Baronets' eldest sons.
‡ Marquesses' eldest sons.	Knights' eldest sons.
‡ Dukes' younger sons.	Baronets' younger sons.
* Viscounts.	Knights' younger sons.
† Earls' eldest sons.	‡ Colonels.
‡ Marquesses' younger sons.	‡ Serjeants-at-law.
* Secretary of State, if a bishop.	‡ Doctors.
* The Bishop of London.	‡ Esquires.
* ——— Duham.	‡ Gentlemen.
* ——— Winchester.	‡ Yeomen.
* Bishops.	‡ Tradesmen.
* Secretary of State, if a baron.	‡ Artificers.
* Barons.	‡ Labourers.
† Speaker of the House of Commons.	N.B. Married women and widows
† Lords Commissioners of the Great Seal.	are entitled to the same rank among
‡ Viscounts' eldest sons.	each other as their husbands would
‡ Earls' younger sons.	respectively have borne between them-
‡ Barons' eldest sons.	selves, except such rank is merely
Knights of the Garter.	professional or official; and unmar-
Privy Councillors.	ried women to the same rank as their
	eldest brothers would bear among men
	during the lives of their fathers.

* 53 Geo. 3, c. 24; 5 Vict. c. 5, s. 25. † 5 & 6 Vict. c. 122, s. 65.

[Esquires and gentlemen are confounded together by Sir Edward Coke, who observes (*s*), that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armour, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled what constitutes the distinction, or who is a real *esquire*; for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them (*t*): 1. The eldest sons of knights, and their eldest sons, in perpetual succession (*u*); 2. The elder sons of younger sons of peers, and their eldest sons in like perpetual succession; both which species of esquires Sir Henry Spelman entitles *armigeri natalitii* (*x*). 3. Esquires created by the king's letters patent, or other investiture (*y*); and their eldest sons. 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown,] and are named esquires by the king in their commission or appointment (*z*). [To these, however, may be added] barristers-at-law (*a*) and [the esquires of knights of the bath, each of whom constitutes three at his installation; and all foreign peers; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings (*b*). As for *gentlemen*,

(*s*) 2 Inst. 668.

(*t*) Ibid.

(*u*) Ibid. 667.

(*x*) Gloss. 43.

(*y*) This creation has long been disused. Esquires thus created were invested *culcaribus argentatis*, to distinguish them from the *equites aurati*. In the life of Chaucer, we are told that

he was created *scutifer* to Edward III. Scutifer is the same as armiger; and our word esquire is derived from *scutum*, or the French *escu*, a shield.—Christian's Blackstone, vol. i. p. 406.

(*z*) See Talbot v. Eagle, 1 Taunt. 510.

(*a*) R. v. Brough, Esq. 1 Wils. 244.

(*b*) 3 Inst. 30; 2 Inst. 667.

[says Sir Thomas Smith (c), they be made good cheap in this kingdom ; for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman (d). A *yeoman* is he that hath free land of forty shillings by the year ; who was antiently thereby qualified to serve on juries, vote for knights of the shire, and do any other act, where the law requires one that is *probus et legalis homo* (e).

The rest of the commonalty are *tradesmen, artificers, and labourers* ; who, as well as all others, must in pursuance of the statute 1 Hen. V. c. 5, be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all indictments ; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.]

(c) Commonw. of Eng. b. 1, c. 20.

(d) The eldest son has no prior claim to the degree of gentleman ; for it is the text of Littleton, that “ every

son is as great a gentleman as the eldest.” Sect. 210.—Christian’s Blackstone, vol. i. p. 406.

(e) 2 Inst. 668.

CHAPTER X.

OF MAGISTRATES AND OTHER PUBLIC OFFICERS.

[IN a former chapter of these Commentaries, we distinguished magistrates into two kinds—supreme, or those in whom the sovereign power of the state resides, and subordinate, or those who act in an inferior secondary sphere (*a*). We have hitherto considered the former kind only; namely, the supreme legislative power or parliament, and the supreme executive power, which is the sovereign; and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of her majesty's great officers of state, the principal secretaries, or the like, because they are not in that capacity in any considerable degree the objects of our laws, nor have any very large share of magistracy conferred upon them, though the principal secretaries of state are allowed the power of commitment in order to bring to trial] persons accused of treason, or other crime against the state (*b*), and have, by several modern provisions of the statute law, been intrusted with certain other miscellaneous functions connected with the administration of justice, and the social economy of the realm (*c*). [Neither is this the occasion to treat of the office and authority of the lord chancellor, or the other judges of the superior courts, because they will find a more proper place in a subsequent part of these Commentaries. Nor is it necessary to enter into any minute disquisition with regard to the rights and dignities of mayors and aldermen, or other magistrates of particular

(*a*) Vide sup. vol. ii. p. 347.

(*c*) See particularly 5 & 6 Will. 4,

(*b*) Com. Dig. Officer, E. 8; Entick v. Carrington, 2 Wils. 275. c. 38; 6 & 7 Vict. c. 34, ss. 5, 7, &c.

[corporations, because these are merely private and municipal rights, and confined to the particular franchise. But the magistrates and officers whose rights and duties it will be proper in this chapter to consider, are such as are generally in use, and have a jurisdiction and authority dispersed throughout the kingdom,] which are principally *sheriffs, coroners, justices of the peace, and constables*.

But before we enter upon this disquisition into particular officers, we shall avail ourselves of this opportunity of making a few remarks in this place on the nature of *offices* in general.

Offices are a species of incorporeal hereditaments (*d*), and were enumerated as such in a former part of this work. They have been defined as consisting in the right to exercise a public or private employment (*e*). But we here use the word in its more limited and usual sense, comprising employments only of a public nature—such as entitle a man to act in the affairs of others, without their appointment or permission (*f*). The right of nomination to an antient office belongs, in most cases, to the crown, in some to a subject; and new offices may be created by the crown; but not such as are contrary to the constitution, or prejudicial to the public (*g*). In some instances they are granted for life, in others during pleasure only; and in the case of particular offices, where no inconvenience can arise to the public from such a mode of limitation, they may be granted to a man and his heirs, or to one man for life, remainder over to another, or for a term of years; or if they relate to lands or houses, they are capable of being entailed (*h*). They may be distinguished into offices of trust (comprising those which are judicial), and offices merely ministerial. The former cannot in general be performed by deputy, the latter usually may (*i*).

(*d*) But they seem not to be *tenements*, unless they concern the realty. Co. Litt. 20 a.

(*e*) 2 Bl. Com. 36.

(*f*) See R. v. Burnell, Carth. 478.

(*g*) Bac. Ab. Offices, B.

(*h*) Co. Litt. 20 a.

(*i*) Com. Dig. Officer, D.; R. v. Ferrand, 3 B. & Ald. 260; R. v. Gravesend, 2 B. & C. 602; R. v. Roberts, 3 A. & E. 771.

It is also a general rule with respect to a judicial office, that it cannot be granted in reversion (*j*); because, though the grantee may be able to execute it at the time of the grant, yet before the office falls, he may become insufficient; but ministerial offices, being capable of performance by deputy, may be so granted (*k*).

By the 5 & 6 Ed. VI. c. 16, no judicial office, or other office of trust (with some few exceptions) can be sold, under pain of disability to dispose of or hold the same. For the law presumes that he who buys an office, will, by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public. And by 49 Geo. III. c. 126, it is made highly penal to buy, sell, or negotiate for the sale or purchase of any such office, or of any other of the public appointments in that act specified.

Where the right of conferring an office is in the crown, the appointment is usually made by letters patent; where in a subject, it should regularly be made by an instrument under his seal (*l*); and, to render the appointment complete, the party should be in general *sworn in*, an oath being usually taken for the due execution of the duties (*m*); in addition to which, oaths are prescribed by various acts of parliament as a qualification for holding office. For by 1 Geo. I. st. 2, c. 13, (amended by 2 Geo. II. c. 31, and 9 Geo. II. c. 26,) all persons admitted to any office, civil, naval or military (*n*), (with the exception of some few of an inferior kind,) are bound, at the peril of incurring loss of the appointment, and other disabilities and forfeitures, to take and subscribe, within six calendar months after their preferment, the oaths of allegiance, supremacy, and abju-

(*j*) Co. Litt. 3 b; Com. Dig. Officer, B. 14.

(*k*) Com. Dig. Officer, B. 13; 11 Rep. 4.

(*l*) Bac. Ab. Officer, E. L.

(*m*) See *Rex v. Roberts*, 3 Ad. & El. 771. By 5 & 6 Will. 4, c. 62, s. 9,

churchwardens and sidesmen shall, in lieu of an oath, make and subscribe a declaration, that they will faithfully and diligently perform the duties of the office; and shall take no oath on quitting office.

(*n*) See 57 Geo. 3, c. 92.

ration (*o*), and, by 9 Geo. IV. c. 17, they are also to subscribe the declaration prescribed by that act, in lieu of the sacramental test (*p*). In the case indeed of offices of trust in corporate towns, it is required (*q*) that the oaths of allegiance and supremacy shall be taken at the same time with the oath for the due execution of the duties (that is upon admission), and that the declaration should be made and subscribed upon the same occasion, or within one calendar month previous thereto (*r*). But Quakers, Moravians, and Separatists, are allowed to make the declaration in a different form (*s*); and with respect to Roman Catholics, the oaths of allegiance, supremacy, and abjuration are dispensed with, and in lieu thereof, they take the oath appropriate to that creed, and prescribed by 10 Geo. IV. c. 7 (*t*).

An office, after it is granted, may be forfeited by misconduct, of which Lord Coke enumerates three kinds,—*abuser*, as when a gaoler voluntarily permits a prisoner to escape; *non-user*, or neglect to attend to the duties; or, lastly, a refusal to perform them (*u*).

And it is farther laid down, that where incompatible offices are granted, the first becomes in some cases void, in others voidable only; and that the grant of an office is also void, if made to a person incapable, from his position, to perform its duties with impartiality (*x*).

Lastly, it is to be observed that offices held under the crown become in general extinct by the demise of the crown (*y*). But by 1 Geo. III. c. 23, the commissions of the judges are continued notwithstanding that event; and by various other statutes (*z*) all public appointments

(*o*) As to the oaths of allegiance, supremacy, and abjuration, vide sup. vol. ii. p. 422.

(*p*) As to this declaration, vide post, Book IV. Part II. Chap. II.

(*q*) 13 Car. 2, st. 2, c. 1, s. 12, amended by 5 Geo. 1, c. 6, s. 2.

(*r*) 9 Geo. 4, c. 17, s. 2. See Reg. v. Humphry, 1 Will. Woll. & Hodg. 470.

(*s*) 1 & 2 Vict. cc. 5, 15.

(*t*) As to the Roman Catholic oath, vide post, Book IV. Part II. Chap. II.

(*u*) 6 Rep. 50; Co. Lit. 233 a; Bac. Ab. Office, M.

(*x*) Com. Dig. Officer, B. 6; Arkwright v. Cantrell, 7 Ad. & El. 565; R. v. Patteson, 4 B. & Ad. 9.

(*y*) Bac. Ab. Courts, C.

(*z*) 7 & 8 Will. 3, c. 27, s. 21; 1 Ann. st. 1, c. 8; 4 Ann. c. 8, s. 8; 6 Ann. c. 7, s. 8; et vide 57 Geo. 3, c.

are now in general continued for six months after the crown's demise.

To return now to the particular officers enumerated at the outset, we will consider first, the law relating to *sheriffs*.

[I. The Sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, *ŕeine* *ŕeƿeƿa*, the reeve, bailiff or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*, to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties (*a*). But the earls, in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burthen (*b*), reserving to themselves the honour; but the labour was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of and not subject to the earl; the king by his letters patent committing *custodiam comitatús* to the sheriff, and him alone.

Sheriffs were formerly chosen by the inhabitants of the several counties; in confirmation of which it was ordained by statute 28 Edw. I. c. 8, that the people should have election of sheriffs in every shire where the shrievalty is not of inheritance; for antiently in some counties the sheriffs were hereditary, as it is apprehended they were in Scotland till the statute 20 Geo. II. c. 43, and still continue in the county of Westmoreland to this day (*c*); the city of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter (*d*). The

45. As to fees and stamps on new commissions, see 11 Geo. 4 & 1 Will. 4, c. 43; as to appointments in British possessions abroad, 1 Will. 4, c. 4.

(*a*) As to this division, vide sup. vol. i. p. 117.

(*b*) Dalton, Of Sheriffs, c. 1.

(*c*) The Earl of Thanet is hereditary sheriff of Westmoreland. This office may descend too and be executed by

a female; for Anne Countess of Pembroke had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assizes at Appleby she sat with the judges on the bench, Harg. Co. Litt. 326. — Christian's Blackstone, vol. i. p. 340.

(*d*) The election of the sheriffs of London and Middlesex was granted to the citizens of London for ever in

[Reason of these popular elections is assigned in the same statute, c. 13, "that the commons might chuse such as would not be a burthen to them." And herein appears plainly a strong trace of the democratical part of our constitution, in which form of government it is an indispensable requisite that the people should chuse their own magistrates (*e*). This election was in all probability not absolutely vested in the commons, but required the royal approbation; for in the Gothic constitution the judges of the county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king, and the form of their election was thus managed: the people or *incolæ territorii* chose *twelve* electors, and they nominated *three* persons *ex quibus rex unum confirmabat* (*f*). But with us in England, these popular elections growing tumultuous, were put an end to by the statute 9 Edw. II. st. 2, which enacted that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges, as being persons in whom the same trust might with confidence be reposed.] As to the manner in which this duty is to be performed, the [statute of Cambridge, 12 Ric. II. c. 2 (*g*), ordains, that the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs* and other officers of the king, shall be sworn to act indifferently, and to appoint no man that sueth either privily or openly to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is, (and has been at least ever

very antient times, upon condition of their paying 300*l.* a year to the king's exchequer. In the year 1748, the corporation of London made a bye-law imposing a fine of 600*l.* upon every person, who, being elected, should refuse to serve the office of sheriff. See the case of Evans, Esq. and the Chamberlain of London, 2 Burn, E.L. 185.—

Christian's Blackstone, vol. i. p. 340. As to the shrievalty of London and Middlesex, see also 1 Man. & Gr. 544, n.

(*e*) Montesquieu, Sp. L. b. ii. c. 2.

(*f*) Stiern. De Jure Goth. l. i. c. 3.

(*g*) See also 14 Ed. 3, st. 1, c. 7; 23 Hen. 6, c. 9; 21 Hen. 8, c. 20.

[since the time of Fortescue (*h*), who was chief justice and chancellor to Henry VI.,) that all the judges, together with the other great officers and privy councillors, meet in the Exchequer on the morrow of All Souls yearly, (which day is now altered to the morrow of Saint Martin by the last Act (*i*) for abbreviating Michaelmas Term,) and then and there the judges propose three persons, to be reported, (if approved of,) to the king, who afterwards appoints one of them to be sheriff (*k*)], and such appointment generally takes place about the end of the following Hilary Term. It is to be understood, however, that the ceremony here described is not observed upon the *occasional* appointment of a sheriff, as on the death of an existing officer; the appointment is then the mere act of the crown (*h*). But in general, the appointment of a *pocket* sheriff, that is a sheriff not of the number nominated in the exchequer, seems to be considered by Blackstone as a practice of questionable legality (*l*); and, after citing a case (*m*) where it was laid down that the queen might by her prerogative make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium*, he remarks that [the doctrine of *non obstante*, which sets the prerogative above the law, was effectually demolished by the bill of rights at the revolution, and abdicated Westminster Hall when King James abdicated the kingdom.]

By 3 & 4 Will. IV. c. 99, it is provided, that whenever any person shall be duly pricked or nominated by his majesty to be sheriff of any county, except the county palatine of Lancaster, the same shall be forthwith notified in the London Gazette, and a warrant made out and signed

(*h*) De L. L. c. 24.

(*i*) 24 Geo. 2, c. 48, s. 12.

(*k*) Bac. Ab. Sheriff, C. Blackstone remarks that our custom of the twelve judges (for such in his time was the number of judges) proposing three persons, seems borrowed from the Gothic constitution above mentioned, with this difference, that among the Goths the twelve nominors

were first elected by the people themselves. He conjectures, too, that this usage was, at its first introduction, founded upon some statute, though not now to be found among our printed laws. See also 2 Inst. 559.

(*l*) 1 Bl. Com. 340; see 2 Inst. 559.

(*m*) Dy. 225, 226.

by the clerk of the privy council, and transmitted to the person so appointed, and the appointment of sheriff thereby made shall be as valid to all intents as if it had been made by patent under the great seal as formerly; and the sheriff so appointed shall thereupon, and upon taking the accustomed oath of office, exercise all the authorities usually enjoyed by such officers (*n*). But the oath of office here mentioned is not required from the sheriffs of London or Middlesex (*o*).

[Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year (*p*); and yet it hath been said (*q*) that a sheriff may be appointed *durante bene placito*, or during the king's pleasure: and so is the form of the royal writ (*r*). Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death, or the demise of the king, in which last case it was usual for the successor to send a new writ to the old sheriff (*s*); but now, as before remarked (*t*), all officers appointed by the preceding sovereign may hold their offices for six months after his demise, unless sooner displaced by the successor. We may farther observe, that by 1 Ric. II. c. 11, no man that has served the office of sheriff for one year can be compelled to serve the same again within three years after,] if there be other sufficient person within the county (*u*). The discharge of the office is however in general compulsory upon the party chosen, and if he refuses to serve, having no legal exemption, he is liable to indictment or information (*x*). But certain descriptions of persons,

(*n*) Sect. 3. See 5 & 6 Will. 4, c. 28, as to the declaration under 9 Geo. 4, c. 17, in the case of sheriffs of counties corporate.

(*o*) Sect. 6.

(*p*) By 3 & 4 W. 4, c. 99, s. 7, he shall, on expiration of his office, deliver to his successor a correct list of all prisoners in his custody, and of all unexecuted process.

(*q*) 4 Rep. 32 b.

(*r*) Dalt. Of Sheriffs, 8.

(*s*) *Ibid.* 7.

(*t*) *Vide sup.* p. 20.

(*u*) Until a different regulation was made by 8 Eliz. c. 16, in a great many instances two counties had one and the same sheriff. This is still the case in the counties of Cambridge and Huntingdon.—Christian's Blackstone, vol. i. p. 342.

(*x*) 9 Rep. 46; *Harrison v. Evans*, 2 Burn, E. L. 185; *R. v. Woodrow*, 2 T. R. 731.

such as militia officers, barristers, attornies, and prisoners for debt, are not liable to serve; nor are persons under disability by judgment of law (as in the case of outlawry) to be appointed (*y*).

Also by 13 & 14 Car. II. c. 21, s. 7, no person shall be assigned for sheriff unless he have sufficient lands within the same to answer the king and his people. And this is the only qualification required for the office. That it was the intention however of our ancestors that the lands of a sheriff should be considerable, appears from their having this provision so frequently repeated, and that at the same time when they obtained a confirmation of *magna charta* and their most valuable liberties. As the sheriff, both in criminal and civil cases, may have the custody of men of the greatest property in the country, his own estate ought certainly to be large, that he may be above all temptation to permit them to escape, or to join them in their flight. In antient times, accordingly, this office was frequently executed by the nobility and persons of the highest rank in the kingdom, though it is now committed, in general, to commoners (*z*).

The powers and duties of the sheriff are various. [They are either as a *judge*, as the *keeper of the king's peace*, as a *ministerial officer* of the superior courts of justice, or as the *king's bailiff*.

In his *judicial* capacity he is to hear and determine all causes of 40s. value and under, in his county court, of which more in its proper place; and he has also a judicial power in divers other civil cases (*a*). He is likewise to superintend the election of knights of the shire, of coroners and of verderors (*b*), and to return such as he shall determine to be duly elected.

(*y*) Chitty's Blackstone, vol. i. p. 339, n. (2).

(*z*) Christian's Blackstone, vol. i. p. 346 (n.) cites Spelm. Gloss. Vicecom. He adds, that bishops were not unfrequently sheriffs.

(*a*) Dalt. c. 4. One of the most important of these is the trial of issues

out of the superior courts, in cases of debt or demand not exceeding 20*l*. See 3 & 4 Will. 4, c. 42.

(*b*) Officers of the forests, whose office it is to look to the *vert*, and see it well maintained, &c. As to forests, vide sup. vol. ii. p. 17.

[As the *keeper of the king's peace*, both by common law and special commission, he is the first man in the county, and superior in rank to any nobleman therein during his office (c). He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it; and may bind any one in a recognizance to keep the peace. He may, and is bound *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to gaol for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatús*, or power of the county (d); and this summons every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning (e), under pain of fine and imprisonment] (f).

[In his *ministerial* capacity the sheriff is bound to execute all process issuing from the king's] superior [courts of justice,] and in this respect is considered as an officer of these courts. [In the commencement of civil causes,] supposing the case to be such that a *capias* is allowed to issue, [he is to arrest and take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution] (g); and in all these matters he is liable, like other ministerial officers, to an action for the negligent or improper discharge of his duty, at the suit of the party grieved (h). [In criminal matters he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.]

(c) 1 Roll. Rep. 237.

(d) Dalr. c. 95.

(e) Lamb. Eiren. 315.

(f) St. 2 H. 5, c. 8.

(g) As to fees and poundage payable to the sheriff on the execution of civil process, see 49 Geo. 3, c. 46, s. 5; 29 Eliz. c. 4; 7 Will. 4 & 1

Vict. c. 55; 5 & 6 Vict. c. 98, s. 31; Davis v. Griffiths, 4 Mee. & W. 377.

(h) Barrack v. Newton, 1 Ad. & El. N. S. 525; Forsler v. Cookson, ibid. 419; Squire v. Huetsen, ibid. 308; Silk v. Humphery, 4 Ad. & El. 959; 5 & 6 Vict. c. 98, s. 31.

Owing to the nature of the duties last referred to [the sheriff, though,] as we have seen, [the principal conservator of the peace in his county, yet, by the express directions of the Great Charter (*i*), he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amerciaments; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office (*k*); for this would be equally inconsistent, he being in many respects the servant of the justices.]

It is also to be observed, that though the sheriff's authority extends in general over the whole of his county, yet there exist many *liberties* throughout the kingdom exempt from his jurisdiction, being districts in regard to which grants have been antiently made by the crown to individuals, conferring on them or their bailiffs the exclusive privilege or franchise of executing legal process therein (*l*). When it becomes necessary to execute a writ within such a liberty, the course is to direct it to the sheriff as in ordinary cases; but as to the *execution* of it, that belongs by law to the bailiff of the liberty, unless the writ be framed with a clause of *non omittas* (as it is called), specially authorizing the sheriff to enter. But as such clause is now usually, and in the more ordinary writs invariably, inserted, the practical importance of these exemptions from the general jurisdiction of the sheriff is proportionably reduced (*m*).

As the *king's bailiff*, it is the sheriff's business to preserve the rights of the king within his bailiwick, for so his county is frequently called in the writ; a word introduced by the princes of the Norman line, in imitation of the French, whose territory was divided into bailiwicks, as

(i) Cap. 17.

c. 27, s. 3.

(k) St. 1 Mar. st. 2, c. 8.

(m) Carrell v. Smallpage, 9 East,

(l) 2 Bl. Com. 37. See 5 Geo. 2, 330.

[that of England into counties (*n*). He must seize to the king's use all lands devolved to the crown by attainder or escheat (*o*); must levy all fines and forfeitures (*p*); and must seize and keep all waifs, wrecks, estrays (*q*), and the like, unless they be granted to some subject (*r*).

To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs and gaolers; who must neither buy, sell nor farm their offices, on forfeiture of 500*l.* (*s*).]

By 3 & 4 Will. IV. c. 99, it is provided, that every sheriff shall, within one calendar month next after the notification of his appointment in the Gazette, by writing under his hand nominate some fit person to be his *under-sheriff*, and transmit a duplicate thereof to the clerk of the peace, to be by him filed among the records of his office, and that every under-sheriff (except of London and Middlesex) shall, before he enters on the execution of his office, take the oath of office.

By 3 & 4 Will. IV. c. 42 (*t*), every sheriff is also directed to appoint a sufficient *deputy*, having an office within a mile of the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting all rules and orders made as to the execution of any process or writ directed to the sheriff (*u*).

[The under-sheriff usually performs all the duties of the office], those of the deputy excepted, and a very few others, where the personal presence of the high-sheriff is necessary. But this inferior minister is only to a certain extent recognized by the law, which holds the sheriff himself

(*n*) Fortesc. de L. L. c. 24.

(*o*) As to attainder and escheat, vide sup. vol. i. p. 401, 408, 438.

(*p*) See 3 & 4 Will. 4, c. 99, s. 31.

(*q*) As to waifs, wrecks and estrays, vide sup. vol. ii. p. 561.

(*r*) Dalt. c. 9. See 3 & 4 Will. 4, c. 99, as to the regulations for auditing the sheriff's accounts, &c. The sheriff was formerly also charged with

the duty of collecting the king's rents within the bailiwick, but is relieved from it by the statute just mentioned, sect. 12.

(*s*) St. 3 Geo. 1, c. 15.

(*t*) Sect. 20.

(*u*) The delivery of a writ to the deputy is a delivery to the sheriff, *Woodland v. Fuller*, 11 A. & E. 859.

civilly responsible for all acts done by his under-sheriff (*x*), and even exempts the latter, where the duty is improperly performed, from any action for negligence at the suit of the party grieved (*y*). It is also enacted [that no under sheriff shall abide in his office above one year (*z*); and if he does, by statute 23 Hen. VI., c. 8, he forfeits 200*l.*, a very large penalty in those early days.] (*a*) It is farther provided, with respect to this officer, that if the sheriff dies, the under-sheriff shall continue in office until a new high-sheriff is appointed (*b*).

[Bailiffs or sheriffs' officers are either bailiffs of hundreds, or bound (*c*) bailiffs. Bailiffs of hundreds are appointed over those respective districts by the sheriffs to collect fines therein, and summon juries; to attend the judges and justices at the assizes and quarter sessions, and also to execute writs and processes in the several hundreds. But as these are generally plain men, and not thoroughly skilful in this latter part of their office, that of serving writs and making arrests and executions, it is now usual to join other bailiffs with them, who are generally mean persons, employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey. The sheriff being] in general civilly [answerable for the misdemeanors of these bailiffs (*d*), they are therefore annually bound in an obligation with sureties for the due execution of their office, and thence are called bound-bailiffs, which the common people have corrupted into a much more homely appellation.] It is to be observed however that besides these officers the sheriffs are in the practice of appointing, at the application of a party in a civil suit, persons named by such party, for the purpose

(*x*) As to this liability, see the authorities cited, vide sup. p. 26, n. (*x*).

(*y*) *Cameron v. Reynolds*, Cowp. 403.

(*z*) St. 42 Edw. 3, c. 9.

(*a*) It was formerly prohibited to under-sheriffs and sheriffs' officers to practise as attorneys; st. 1 Hen. 5,

c. 4; but the prohibition is repealed by 6 & 7 Vict. c. 73.

(*b*) 3 Geo. 1, c. 15, s. 8.

(*c*) Called by Blackstone "special," as well as "bound" bailiffs.

(*d*) *Drake v. Sykes*, 7 T. R. 113; *Barsham v. Bullock*, 10 A. & E. 23.

of executing some particular process therein. Persons so appointed are called *special* bailiffs, and whenever a party thus chooses his own officers, it is held to discharge the sheriff from all responsibility for what is done by them in the execution of the process (*e*).

[Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant, and if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter, or in a civil case, to the party injured (*f*).] The abuses of gaolers (as also of keepers of houses of correction) are repressed, and the treatment of the unfortunate persons in their custody regulated, by many useful acts of parliament (*g*), which we shall have occasion to notice in another place.

[The vast expense which custom had introduced in serving the office of high-sheriff was grown such a burthen to the subject that it was enacted by statute 13 & 14 Car. II. c. 21, that no sheriff (except of London, Westmoreland, and towns which are counties of themselves (*h*),) should keep any table at the assizes except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery; yet for the sake of safety and decency he may not have less than twenty men in England and twelve in Wales, upon forfeiture, in any of these cases, of 200*l*.]

[II. The office of the Coroner is also a very antient one at the common law (*i*). He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such wherein the sovereign is more immediately con-

(*e*) Ford v. Leche, 6 Ad. & El. 699; Balson v. Meggat, 4 Dowl. 557.

(*f*) Dalt. c. 118; Mitton's case, 4 Rep. 34.

(*g*) Vide post, under the head of Gaols; see also 32 Geo. 2, c. 28; 7

Will. 4 & 1 Vict. c. 55, s. 3.

(*h*) As to these, vide sup. vol. i. p. 123.

(*i*) See Jervis on the Office and Duties of Coroners; Com. Dig. Officer, G.

[cerned (*k*). And in this light the lord chief justice of the Queen's Bench is the principal coroner in the kingdom, and may if he pleases exercise the jurisdiction of a coroner in any part of the realm (*l*). But there are also particular coroners for every county of England (*m*), usually four, but sometimes six, and sometimes fewer (*n*). This officer is of equal antiquity with the sheriff (*o*), and was ordained with him to keep the peace, when the earls gave up the wardship of the county.

He is still chosen by all the freeholders in the county court, as by the policy of our antient laws the sheriffs and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people (*p*), and as verderors of the forest also were, whose business it was to stand between the prerogative and the subject in the execution of the forest laws (*q*). For this purpose there is a writ at common law *de coronatore eligendo* (*r*), in which it is expressly commanded the sheriff *quod talem eligi faciat, qui melius et sciatur et velit et possit officio illi intendere*. And in order to effect this more surely, it was enacted by the statute of Westminster 1 (*s*), that none but lawful and discreet knights should be chosen, and there was an instance in the 5 Edw. III. of a man being removed from his office because he was merely a merchant (*t*). But it seems] that it has long been and still is [sufficient (*u*) if a man hath lands enough to be made a knight,] that is, lands to the amount of 20*l.* per annum (*x*); a qualification very inadequate in modern times to the object; and accordingly Blackstone complains that the coronership was in his time no longer

(*k*) 2 Inst. 31; 4 Inst. 271.

(*l*) 4 Rep. 57.

(*m*) In every borough having a separate quarter sessions, a coroner is to be appointed with exclusive jurisdiction within the borough, 5 & 6 Will. 4, c. 76, ss. 62, 63.

(*n*) F. N. B. 163.

(*o*) Mirror, c. 1, s. 3.

(*p*) 2 Inst. 558.

(*q*) As to these, vide sup. p. 25, n.

(*r*) F. N. B. 163.

(*s*) 3 Edw. 1, c. 10.

(*t*) 2 Inst. 32.

(*u*) F. N. B. 163, 164; vide Com. Dig. Officer, G. 4.

(*x*) Vide sup. vol. i. p. 176.

undertaken by gentlemen of property, and that [though formerly no coroner would condescend to be paid for serving their country, yet for many years past they had only desired to be chosen for the sake of the perquisites.] In our own times, however, the coroners are in general persons of unquestionable respectability, and their position in life such as to cast no discredit on the employment.

By 7 & 8 Vict. c. 92 (*y*), coroners may be appointed for districts within counties instead of the county at large, if the county shall have been divided, by such authority as therein mentioned, into several districts for such purpose; and the sheriff shall hold the election for coroner within such districts respectively; and the election shall be made by the county freeholders residing therein. And if the election be not determined on view, then the sheriff is to take a poll; and every freeholder (if required) is to be sworn before he polls. But the crown, and certain lords of franchises, having a charter from the crown for that purpose, may appoint coroners for certain precincts or liberties, by their own mere grant, and without election (*z*); and by 5 & 6 Will. IV. c. 76, ss. 62, 64, the council of every borough in which a separate court of quarter sessions shall be holden shall appoint a fit person to be coroner for the borough; but in other boroughs the coroner of the county at large is to act.

[The coroner is chosen for life; but may be removed by being made sheriff, which is an office incompatible with the other, or by the writ *de coronatore exonerando*, for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years or sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it (*a*). And by the statute 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also made causes of removal.]

By 6 & 7 Vict. c. 83, reciting that the coroners of bo-

(*y*) Repealing 58 Geo. 3, c. 95.

7 Will. 4 & 1 Vict. c. 64.

(*z*) As to the election of the coroners for the county of Durham, vide

(*a*) F. N. B. 163, 164. See Ex parte Parnell, 1 J. & W. 451.

roughs and liberties are empowered by law to appoint deputies to act in their stead in certain cases, but that the coroners of counties are not, it is provided that it shall be lawful for every coroner of a county, city, riding, liberty, or division, by writing under his hand and seal, to appoint from time to time a proper person (to be approved by the lord chancellor) to act for him as his deputy in the holding of inquests during the illness of the coroner, or his absence from any lawful or reasonable cause.

[The office and power of a coroner are, like those of the sheriff, either *judicial* or *ministerial*, but principally *judicial*. This is in great measure ascertained by statute 4 Edw. I. *de officio coronatoris*, and consists, first,] and principally, [in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death.] When such a death happens (*b*), it is the duty of the township to give notice of it to the coroner, upon which he is to issue a precept to the constable of the four, five, or six next townships, to return a competent number of good and lawful men to appear before him at such a place, to make an inquisition concerning the matter. This inquisition must be held before the coroner as presiding officer, and the court held before him on this occasion is a court of record (*c*). The jury (who must consist of twelve at least (*d*)) are to be sworn and charged by the coroner to inquire how the party came by his death (*e*). The inquisition [must be had *super visum corporis*, for if the body be not found, the coroner cannot sit,] except by virtue of a special commission issued for the purpose (*f*). By the common law he was also [to sit at the very place where the death happened], though not necessarily at the same place where the body was viewed; for the jury might adjourn elsewhere, if found more convenient (*g*). But now, by 6 & 7 Vict.

(*b*) See *R. v. Justices of Kent*, 11 East, 230.

(*c*) 4 Inst. 271. As to the right of the public to be present at this court, see *Garnett v. Ferrand*, 6 B. & C. 626.

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(*d*) 2 Hale's P. C. 59.

(*e*) *Ibid.* 60.

(*f*) *Ibid.* 58; 2 Hawk. c. 9, s. 23; *R. v. Ferrand*, 3 B. & Ald. 260

(*g*) 2 Hawk. P. C. c. 9, s. 25.

D.

c. 12 (reciting that it often happens that it is unknown where persons lying dead have come by their deaths, and also that persons die in other places than those in which the cause of death happened), it is provided that the coroner only, within whose jurisdiction the body shall be *lying dead*, shall hold the inquest, though the cause of death may not have arisen within his jurisdiction; and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy coroner for the jurisdiction of the admiralty of England, the inquest shall be held only by the coroner having jurisdiction in the place where the body shall be first brought to land. And farther, that for the purpose of coroners' inquests, every detached part of a county, riding, or division shall be deemed to be within that county, riding or division by which it is wholly surrounded; or where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the largest common boundary.

Upon this inquisition the coroner and jury must hear such evidence as is offered, either on the part of the crown, or the person suspected (*n*), and it is to be given upon oath. By 6 & 7 Will. IV. c. 89, it is provided, that whenever it shall appear to the coroner that the deceased was attended at his death, or during his last illness, by any legally qualified medical practitioner, he may issue his order for the attendance of such practitioner as a witness at the inquest; and where the deceased was not so attended, an order for the attendance of any legally qualified medical practitioner, being at the time in actual practice, in or near the place where the death happened; and the coroner may also direct the performance by the medical witness or witnesses of a *post mortem* examination, with or without an analysis of the contents of the stomach or intestines; provided however, that if any person shall state on oath before the coroner, his belief that the death was caused entirely or in part by the improper or negligent

(*n*) R. v. Scorey, 1 Leach, C. C. 50; 2 Hale's P. C. 62.

treatment of any person, such person shall not be allowed to perform or assist at the *post mortem* examination. It is also enacted, that when it shall appear to the majority of the jury that the cause of death has not been satisfactorily explained by the witnesses in the first instance, they may name to the coroner in writing, any other legally qualified practitioner or practitioners, and require their attendance as witnesses, or for the performance of a *post mortem* examination, whether one shall have been previously performed or not. And farther, that all such medical witnesses shall be allowed remuneration for their attendance and trouble; and on the other hand shall forfeit 5*l.* for every neglect to obey an order for their attendance; with a proviso however, that when the death took place in any public hospital or infirmary, or any county or lunatic asylum, no such remuneration shall be allowed to any person whose duty it was to attend the deceased as a medical officer of such institution.

The inquisition must be found with the concurrence of at least twelve of the jury (*o*); and provisions have been recently made (*p*) to prevent it from being quashed on account of certain technical defects in the statute enumerated (*q*). [If any be found guilty by such inquisition of murder or other homicide, the coroner is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby;] and in case of death by misadventure, [he must inquire whether any deodand (*r*) has accrued to the king or the lord of the franchise, by his death; and must

(*o*) 2 Hale's P. C. 161, note. And see *Lambert v. Taylor*, 4 B. & C. 138.

(*p*) By 6 & 7 Vict. c. 83.

(*q*) As to the form of the inquisition, and the objections that may arise thereon, see *R. v. West*, 1 A. & E. N. S. 826; *R. v. Polwart*, *Ibid.* 818; *R. v. Eastern Counties Railway*, 10 M. & W. 58; *R. v. Evett*, 6 B. & C. 247; In *Re Culley*, 5 B. & Ad. 230;

R. v. Stockdale, 8 Powl. P. C. 516; *R. v. Brownlow*, 11 A. & E. 119; *R. v. Grand Junction Railway Company*, *Ibid.* 128, (n.); *Ex parte Daws*, 8 A. & E. 936.

(*r*) As to deodands, vide *supra*, vol. ii. p. 566; Com. Dig. Waife (E.) *R. v. Brownlow*, 11 Ad. & El. 119; *R. v. Polwart*, 1 Gale & Dav. 211; *Ibid.* 1 A. & E., N. S., 818, S. C.

[certify the whole of this inquisition, under his own seal and the seals of the jurors (s), together with the evidence thereon, to the Court of King's Bench or the next assizes.] And by 7 Geo. IV. c. 64, s. 4, every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence, or so much thereof as material, and shall have authority to bind by recognizance all such persons as know or declare any thing material touching such offence, to appear at the next court of oyer and terminer or gaol delivery, or superior court of a county palatine, at which the trial is to be, then and there to prosecute or give evidence against the party charged. And such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition, and deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court.

With respect to the expenses with which inquests are necessarily attended, provision is made by the statute 7 Will. IV. & 1 Vict. c. 68, which empowers the justices of the peace at quarter sessions, and the town councils of boroughs having coroners, to make a schedule of the fees, allowances, and disbursements, which, on the holding of any inquest on a dead body, may be lawfully paid by the coroner, (other than the fees to medical witnesses); and upon the termination of the proceedings on any inquest, the coroner may advance and pay all expenses necessarily incurred, not exceeding the amount in such schedule, and also the remuneration allowed by the former act to the medical witnesses, and shall be repaid the same out of the county rate or borough fund, as the case may be.

As to the coroner's own remuneration upon inquests, it is also in general payable out of the county rate (t), in the

(s) Stat. 33 Hen. 8, c. 12; 1 & 2 Phil. & Mary, c. 13; 2 West. Symb. s. 310; Crompt. 264; Tremain's P. C. 621.

(t) See the exceptions in 25 Geo. II. c. 29. But the exception as to the coroners of the county of Durham, is now repealed by 7 Will. 4 & 1 Vict. c. 64.

shape of fees upon each inquisition taken ; the amount of which fees is regulated in part by the statute last mentioned (*u*), but chiefly by the 25 Geo. II. c. 29 (*x*).

[Another branch of the coroner's office, is to inquire concerning shipwrecks, and certify whether wreck (*y*) or not, and who is in possession of the goods. Concerning treasure trove (*z*), he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure] (*a*).

The coroner is also a conservator of the king's peace, and becomes a magistrate by virtue of his appointment, having power to cause felons to be apprehended, whether an inquisition have been found against them or not (*b*).

[The *ministerial* office of the coroner is only as the sheriff's substitute] in executing process. [For when just exception can be taken to the sheriff for suspicion of partiality, (as that he is interested in the suit, or of kindred to either plaintiff or defendant,) the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs (*c*).

III. The next species of subordinate magistrates that we are to consider, are Justices of the peace ; the principal of whom is the *custos rotulorum*, or keeper of the records of the county (*d*). The common law hath ever had a special care and regard for the conservation of the peace ; for peace is the very end and foundation of civil society. And, therefore, before the present constitution of justices was invented, there were peculiar officers appointed by

(*u*) Sect. 3.

(*x*) They were formerly regulated by 3 Hen. 7, c. 1, vide 2 Inst. 210. As to coroner's fees, see R. v. Justices of West Riding of Yorkshire, 7 T. R. 52 ; R. v. Justices of Kent, 11 East, 229 ; R. v. Justices of Oxfordshire, 2 Barn. & Ald. 203 ; 8 D. & R. 147.

(*y*) As to wreck, vide sup. vol. ii. p. 555.

(*z*) As to treasure trove, vide sup. vol. ii. p. 559.

(*a*) "That may be well perceived," saith the old statute of Edw. 1, "where one liveth riotously, frequenting taverns, and hath done so of long time ;" whereupon he might be attached, and held to bail upon this suspicion only. 1 Bl. Com. 349.

(*b*) Jervis on Coroners, 21.

(*c*) 4 Inst. 271.

(*d*) As to the *custos rotulorum*, see 3 & 4 Edw. 6, c. 1 ; Harding v. Pollock, 6 Bing. 25 ; 4 Bl. C. 272.

[the common law, for the maintenance of the public peace. Of these, some had and still have this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes*, or *conservatores pacis*. Those that were so, *virtute officii*, still continue; but the latter sort are superseded by the modern justices.

The queen's majesty (*e*) is, by her office and dignity royal, the principal conservator of the peace within all her dominions, and may give authority to any other to see the peace kept, and to punish such as break it: hence it is called the queen's (or king's) peace. The lord chancellor, or keeper; the lord treasurer; the lord high steward of England; the lord mareschal, the lord high constable of England, (when any such officers are in being); and all the justices of the court of queen's bench (by virtue of their offices); and the master of the rolls (by prescription); are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it (*f*): the other judges are only so in their own courts. The coroner is also (as we have seen) a conservator of the peace within his own county (*g*), as is also the sheriff (*h*); and both of them may take a recognizance or security for the peace. Constables, tything men, and the like, are also conservators of the peace within their own jurisdictions, and may apprehend all breakers of the peace, and commit them till they find sureties for their keeping it (*i*).

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription (*k*), or were bound to exercise it by the tenure of their lands (*l*), or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatús sui in custodes pacis* (*m*)."

 But

(*e*) Lambard, Eirenarch. 12.

(*f*) Lamb. 12.

(*g*) Britton, 3.

(*h*) F. N. B. 81.

(*i*) Lamb. 14.

(*k*) Ibid. 15.

(*l*) Ibid. 17.

(*m*) Ibid. 16.

[when Queen Isabel, the wife of Edward II., had contrived to depose her husband by a forced resignation of the crown, and had set up his son Edward III. in his place, this, being a thing then without example in England, it was feared would much alarm the people; especially as the old king was living, though hurried about from castle to castle, till at last he met with an untimely death. To prevent therefore any risings or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by Thomas Walsingham (*n*), giving a plausible account of the manner of his obtaining the crown, to wit, that it was done *ipsius patris bene placito*; and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinherittance, and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament (*o*), that for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the county, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people and given to the king (*p*); this assignment being construed to be by the king's commission (*q*). But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Ed. III., c. 1, gave them the power of trying felonies; when they acquired the more honourable appellation of justices (*r*).

These justices] (being the *justices of the peace* of whom we proposed, under the present head, to treat,) [are appointed by the queen's special commission under the great

(*n*) Hist. A. D. 1327.

(*o*) St. 1 Edw. 3, st. 2, c. 16.

(*p*) Lamb. 20. Vide sup. p. 22, as to the manner in which the election of *sheriffs* had previously been taken from the people.

(*q*) St. 4 Edw. 3, c. 2; 18 Edw. 3, st. 2, c. 2.

(*r*) Lamb. 23; 36 Edw. 3, st. 1, c. 12. Much information on the origin of the justices of peace will be found in Reeves's Hist. Eng. &c. vol. ii. p. 472; vol. iii. p. 216, 242, 265, 290; vol. iv. p. 154; Harding v. Pollock, 6 Bing. 25.

[seal, the form of which was settled by all the (s) judges A.D. 1590] (t), and continues with little alteration to this day. [This appoints them all, jointly and severally, to keep the peace in the particular county (u) named, and any two or more of them to inquire of and determine felonies and other misdemeanors in such county committed; in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence, the words of the commission] running thus, [*quorum aliquem vestrum, A. B. C. D. &c. unum esse volumus*, whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable person, for the sake of propriety; and no exception is now allowable for not expressing in the form of the warrants, &c. that the justice who issued them is of the *quorum* (v). When any justice] named in the commission [intends to act under it, he sues out a writ of *dedimus potestatem* from the clerk of the crown in Chancery, empowering certain persons therein named to administer the usual oaths to him,] (i. e. an oath of office, and of qualification as to estate, to which are annexed the oaths of allegiance, supremacy, and abjuration (x)); which done, he is at liberty to act. These justices (some parti-

(s) See the form of the writ, Lamb. 36.

(t) Lamb. 43.

(u) As to the justices in boroughs, see 4 & 5 Will. 4, c. 27; 5 & 6 Will. 4, c. 76, sects. 7, 8, 9, 101, 103, 104, 107, 109, 111; 2 & 3 Will. 4, c. 64; 6 & 7 Will. 4, c. 105; R. v. Justices of Gloucestershire, 4 A. & E. 689. As to justices in and near the metropolis, 10 Geo. 4, c. 44; 2 & 3 Vict. c. 47; 3 & 4 Vict. c. 84. As to the power of county justices to act in detached districts, 2

& 3 Vict. c. 82; towns being counties of themselves, or other places of exclusive jurisdiction, 9 Geo. 1, c. 7, s. 3; 28 Geo. 3, c. 49, s. 4; 1 & 2 Geo. 4, c. 63. As to their power to act in boroughs, 5 & 6 Will. 4, c. 76, s. 111; R. v. Shepherd, 1 A. & E. 298.

(v) St. 26 Geo. 2, c. 27. See also as to justices of boroughs, &c. 7 Geo. 3, c. 21; 4 Geo. 4, c. 27.

(x) 5 Burn's Justice, by D'Oy. & Will. vol. v. p. 20.

cular classes of them excepted) act gratuitously, receiving neither salary nor fees (*y*).

[Touching the number and qualification of these justices, it was ordained by statute 18 Ed. III. c. 2, that *two* or *three* of the best reputation in each county shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Ed. III. c. 1, that one lord and three or four of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute 12 Ric. II. c. 10, and 14 Ric. II. c. 11, to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambart observed long ago) (*z*) that the growing number of statute laws committed from time to time to the charge of justices of the peace have occasioned also (and very reasonably) their increase to a larger number. And as to their qualifications, the statutes just cited, direct them to be of the best reputation, and most worthy men in the county; and the statute 13 Ric. II. c. 7, orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V. st. 1, c. 4, and st. 2, c. 1, they must be resident in their several counties,] though by 28 Geo. III. c. 49, any justice of peace for two or more adjacent counties may act in any of them, if resident in one. [And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. c. 11, that no justice should be put in commission if he had not lands to the value of 20*l.* *per annum*. And the rate of money being greatly altered since that time, it is

(*y*) There is an antient allowance to justices in respect of their attendance at sessions; but its amount is so trivial as to be a merely nominal remuneration for their expenses on that occasion. Report on County rate, p. 36.

(*z*) Lamb. 34.

Report on County rate, p. 36.
Lamb. 34.
28 Geo. III. c. 49.
18 Hen. VI. c. 11.
2 Hen. V. st. 1, c. 4.
2 Hen. V. st. 2, c. 1.
13 Ric. II. c. 7.
14 Ric. II. c. 11.
12 Ric. II. c. 10.
34 Ed. III. c. 1.
18 Ed. III. c. 2.

[now enacted] by statute 18 Geo. II. c. 20 (*a*), that every justice of the peace acting for a county (except such privileged persons as therein excepted) must have in possession, and for his own benefit, an estate, either legal or equitable, of freehold, copyhold, or customary tenure, in fee, for life, or such terms of years as in the act specified, of the clear yearly value of 100*l.* (*b*) or a reversion, or remainder expectant upon such lease as in the act mentioned, with reserved rents of the clear yearly value of 300*l.* per annum (*c*). Also, to prevent improper practices, it is provided by 6 & 7 Vict. c. 73, s. 33, that no attorney or solicitor shall be capable of being a justice of the peace for any county, during such time as he shall practise as an attorney or solicitor (*d*).

[As the office of these justices is conferred by the crown, so it subsists only during the crown's pleasure, and is determinable, 1. By the demise of the crown, that is, in six months after (*e*). But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh (*f*), nor by reason of any new commission, to take the oaths more than once in the same reign (*g*). 2. By express writ under the great seal (*h*), discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it, seeing it may be revived again by another writ called a *procedendo*. 4. By a new commission, which virtually, though silently, discharges all the former jus-

(*a*) See also 5 Geo. 2, c. 18.

(*b*) Blackstone says that this qualification is almost an equivalent to the 20*l.* per annum required in Henry Sixth's time, and cites Bishop Fleetwood's *Chronicon Pretiosum*.

(*c*) What shall be a sufficient qualification within the statute vide Pack q. t., v. Tarpley, 9 A. & E. 468.

(*d*) There was a similar enactment (now repealed by this act) in 5 Geo. 2,

c. 18. As to the qualification of justices of the peace, it is to be observed that official acts done by a justice not properly qualified, are not therefore void, though he acts at his own peril. *Margate Pier Company v. Hannam*, 3 B. & Ald. 266.

(*e*) 1 Ann. c. 18; vide sup. p. 20.

(*f*) 1 Geo. 3, c. 13.

(*g*) 7 Geo. 3, c. 9.

(*h*) Lamb. 68.

[tices that are not included therein ; for two commissions cannot subsist at once. 6. By accession of the office of sheriff,] which disqualifies during the year of the shrievalty (*i*). [Formerly it was thought that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, this determined his office, he no longer answering the description of the commission ; but now it is provided (*j*) that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

The power, office and duty of a justice of the peace depend on his commission, and on the several statutes which have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace, and thereby gives him all the power of the antient conservators at the common law in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences, which is the ground of their jurisdiction at *quarter sessions* (*k*),] of which more will be said hereafter when we have occasion to treat of crimes and the manner of prosecution. Besides the jurisdiction, which the justices of each county at large exercise, in these and other matters at the quarter sessions, authority is moreover given by various statutes to the justices acting for the several *divisions* (*l*) into which counties are for that purpose distributed, to transact different descriptions

(*i*) 1 Mar. st. 2, c. 8.

(*j*) 1 Edw. 6, c. 7.

(*k*) The jurisdiction of justices at quarter sessions in criminal cases is now defined by 5 & 6 Vict. c. 38. And by the same statute, and also by 59 Geo. 3, c. 28, they are empowered to hold several courts at the same time for the dispatch of business. See 7 & 8 Vict. c. 71, for regulations as to the sessions of the peace for Middlesex.

(*l*) As to divisions, vide 9 Geo. 4,

c. 43 ; 10 Geo. 4, c. 46 ; 6 & 7 Will. 4, c. 12. In the Report of the Commissioners on County Rate, appointed 5th Nov. 1834, (Appendix, part ii. p. 2,) will be found a detailed statement, showing all the divisions for which magistrates act throughout England and Wales, and the places for holding petty sessions, with other particulars, as returned by the magistrates to the commissioners for inquiry into county rate.

of business, (such as licensing alehouses or appointing overseers of the poor or surveyors of highways,) at *special sessions* (*l*); and two justices, or in some cases even a single magistrate, are also frequently empowered by statute to try in a summary way, and without jury, such minor offences as in the statute particularized (*m*); the meeting of two or more justices for which purpose (as for some others also) is denominated a *petty session*. In these and other ways the legislature has from time to time heaped upon the justices such an infinite variety of business, that the country is [greatly obliged to any worthy magistrate that, without any sinister views of his own, will engage in this troublesome service (*n*). And therefore if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office, which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand,] or after the expiration of six months from the commission of the injury, [and stop all suits begun, on tender made of sufficient amends (*o*).] But, subject to these legislative

(*l*) As to manner of serving notices for holding special sessions, see 7 & 8 Vict. c. 33, s. 7.

(*m*) See particularly, as to offences triable before magistrates, 7 & 8 Geo. 4, c. 29, s. 65; 7 & 8 Geo. 4, c. 30; s. 29; 7 & 8 Geo. 4, c. 31, s. 8; 9 Geo. 4, c. 31, s. 33. Also as to the mode of proceeding generally on summary convictions, see 3 Geo. 4, c. 23; 6 & 7 Will. 4, c. 114; *Daubney v. Cooper*, 10 B. & C. 237.

(*n*) In *R. v. Borron*, 3 B. & Ald. 433, the Court of Queen's Bench declared that the justices of peace (acting gratuitously) were "a class of persons" to whom this country were under as "great obligations as this or any other nation is, or ever was, to any members of its community."

(*o*) 7 Jac. 1, c. 5; 21 Jac. 1, c. 12; 24 Geo. 2, c. 44. See also 7 & 8 Geo. 4, c. 30, s. 41; c. 29, s. 63; 43 Geo. 3, c. 141, by which last statute justices are protected from costs, &c. where their convictions are quashed, and actions afterwards brought against them, unless they acted maliciously, and without probable cause. And as to various points in the construction of these statutes, see *Lovelace v. Curry*, 7 T. R. 631; *Massey v. Johnson*, 12 East, 67; *Gray v. Cookson*, 16 East, 13; *Wedge v. Berkeley*, 6 Ad. & El. 663; *Reed v. Cowmeadow*, ib. 661; *Griffith v. Harries*, 2 Mee. & W. 335; *Baylis v. Strickland*, 1 Man. & Gr. 591. It is to be observed, that though by these statutes justices were

protections, a justice of the peace is liable to an action by the party injured, for illegal acts done by colour of his office (*p*). He is also liable to be prosecuted criminally, by indictment or information, if guilty of any corrupt or malicious abuse in the exercise of his judicial discretion; but when he acts fairly and *bonâ fide*, leave will not be granted to file an information against him on account of a mere error in his proceedings (*q*).

[It is impossible, upon our present plan, to enter minutely into the particulars of the accumulated authority committed to the charge of these magistrates. It will be sufficient, therefore, to refer to such subsequent parts of these commentaries as will, in their turns, comprise almost every object of their jurisdiction, and in the meantime recommend to the student the examination of the later editions of Dr. Burn's *Justice of the Peace* (*r*), where he will find everything relative to this subject, both in antient and modern practice, collected with great care and accuracy.]

IV. The officers of whom we have hitherto spoken, though all conservators of the peace, are engaged only in the higher departments of that general duty; but we are now to examine the law relating to those inferior officers called Constables (*s*), a species of civil force of very antient institution, to whom our law commits the service of actually maintaining the peace, and bringing to justice those by whom it is infringed (*t*).

entitled to *double costs* in certain cases, where an action brought against them failed, all such provisions are now repealed by 5 & 6 Vict. c. 97, s. 2, and *full costs* granted in lieu thereof. The same statute also fixes one calendar month as the period in all cases for giving *notice of action*.

(*p*) *Fernley v. Worthington*, 1 Man. & Gr. 491; *Cave v. Mountain*, *ibid.* 257. And see the cases cited *sup.* (*n*.)

(*q*) 2 Burr. 1162; *R. v. Borron*, 3 Barn. & Ald. 432.

(*r*) Blackstone also recommends the more antient treatise of Lambard's *Eirenarchia*, which he cites as his chief authority on the subject of justices of the peace.

(*s*) See Hawk. P. C. b. ii. c. 10; Burn, by D'Oyly & Williams, Constable.

(*t*) This force, originally, no doubt,

[The word *constable* is frequently said to be derived from the Saxon *konīng-ſtafel*, and to signify the support of the king; but as we borrowed the name as well as the office of constable from the French, it seems more satisfactory to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language; wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire; so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms which were performed on horseback (*u*). This great office of lord high constable hath been disused in England, except only upon great and solemn occasions, such as the king's coronation and the like, ever since the attainder of Stafford, Duke of Buckingham, under King Henry VIII.; as in France it was suppressed about a century after, by an edict of Louis XIII. (*x*);] but the constables of whom we now speak are supposed to have originally emanated from this high and important office (*y*).

These constables [are of two sorts, high constables and petty constables. The former,] called also chief constables (*z*), [were first ordained by the Statute of Win-

of very effective character, has been in later times inadequate to its important duties. "Of the extent of the power of " constables," says Blackstone, "considering what manner of men are for " the most part put into these offices, " it is perhaps very well that they are " generally kept in ignorance." (See also Report on County Rate, 16 June, 1836.) But the care of the legislature has been recently applied to the improvement of this force. See the statute 5 & 6 Vict. c. 109, which will be presently noticed in the text.

(*u*) We may form a judgment of the power of the lord high constable, and the condition of the people of this country in the 15th century, from the

following clause in a commission in the 7 Ed. 4, to Richard Earl Rivers: *Plenum potestatem et auctoritatem damus et committimus ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis seu ipsius occasione, cæterisque causis quibuscunque, summarie et de plano, sine strepitu et figura judicii, sola facti veritate inspecta.* Rym. Fœd. tom. xi. p. 582.—Christian's Blackstone, 355, (note). Et vide Reeves's Hist. Eng. Law, vol. iii. p. 194; Hallam, Mid. Ages, vol. iii. p. 223.

(*x*) Phillip's Life of Pole, ii. 111.

(*y*) Lambard of Constables, 5.

(*z*) 4 Inst. 267.

[chester, 13 Edw. I. st. 2, c. 6(a); are appointed at the courts leet of the franchise or hundred over which they preside, or, in default of that,] then by the justices at their special sessions, as directed by 7 & 8 Vict. c. 33, s. 8. [The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, and first instituted about the reign of Edward III.(b).] These petty constables have two offices united in them; the one antient, the other modern. Their [an-tient office is that of headborough, tithing man, or bors-holder, of whom we formerly spoke(c), and who are as antient as the time of King Alfred; their more modern office is that of constable merely, which was appointed, as was observed, so lately as the reign of Edward III., in order to assist the high constable(d). And in general the antient headboroughs, tithing men, and borsholders were made use of to serve as petty constables, though not so generally but that, in many places, they still continue distinct officers from the constable.] The proper duty of the high constable seems to be to keep the king's peace within the hundred(e), as the petty constable does within the parish or township, [and the hundred is answerable for all robberies committed therein by daylight,] as this must be imputed to the negligence of their officers. But he is also, by various statutes, charged with other duties; such as that of serving of precepts and warrants on certain occasions, and the returning of lists of jurors. As to the petty constables, their principal duty is the preservation of

(a) 4 Inst. 276.

(b) According to Lord Coke, 4 Inst. 267, they existed at common law; but perhaps this is to be understood of headboroughs, &c. only.

(c) Sup. vol. i. p. 115.

(d) Lamb. 9.

(e) 1 Bl. Com. 356. See the antient duties specifically enumerated, 4 Inst. 267. Blackstone remarks, that, by the Statute of Winchester, he is to

keep *watch and ward* within his jurisdiction. "*Ward (custodia)* is chiefly "applied to the daytime, in order to "apprehend rioters and robbers on "the highways." "*Watch* is appli- "cable to the night only, being called "among our Teutonic ancestors *wacht* "or *wacta*, (vide Capit. Hludov. Pii, "cap. i. A.D. 815,) and begins at the "time when ward ends."

the peace; though they also have other particular duties assigned to them by act of parliament, particularly the service of the summonses and the execution of the warrants of the justices of the peace, to them directed, relative to the apprehension and commitment of offenders. In the execution of the warrants of the justices of the peace, the petty constable however enjoys certain protections similar to some of those conferred on the justices themselves. Thus, an action cannot be brought against him for what he does as constable, after the expiration of six months from the commission of the act. In one respect, indeed, his privilege is greater than that of a magistrate; for by 24 Geo. II. c. 44, neither he nor those acting in aid of him, shall be sued without making the justice who signed the warrant a joint defendant, and on production of such warrant at the trial of the cause, the jury shall give their verdict for the constable, notwithstanding any defect of jurisdiction in the magistrate (*f*).

Petty constables, headboroughs, tithing men, and borsholders were formerly all chosen by the jury at the court leet; or if no court leet were held, then by two justices of the peace (*g*). But it is now provided by 5 & 6 Vict. c. 109, intituled "An Act for the Appointment and Payment of Parish Constables," that for the future no petty constable, headborough, borsholder, tithing man, or peace officer of the like description, shall be appointed for any parish, township, or vill, within the limits of that act (*h*),

(*f*) *Price v. Messenger*, 2 Bos. & Pul. 158; *Bell v. Oakley*, 2 M. & S. 259; *Theobald v. Crichmore*, 1 B. & A. 227. See also as to the notice of action required in the case of constables, 7 & 8 Geo. 4, c. 29, s. 63; c. 30, s. 41, &c. &c.; *Ballinger v. Ferris*, 1 Moo. & W. 628.

(*g*) 14 & 15 Car. 2, c. 12, s. 15; 1 Bl. Com. 356. See *R. v. Mosley*, 3 Ad. & El. 488.

(*h*) The act extends in general to

every parish or township maintaining its own poor, and every extra-parochial place; but does not apply to the city of London or the metropolitan police district, or any borough within the Municipal Act, or any parish which levies rates for the payment of constables under 3 & 4 Will. 4, c. 90, or under any local act, or to the County Palatine of Chester. As to liberties, &c. see 7 & 8 Vict. c. 52. As to constables within the metropolitan po-

at any court leet or tourn, “except for the performance of
 “duties unconnected with the preservation of the peace
 “or with the execution of that act.” And the same statute, moreover, contains provisions for the future appointment and regulation of petty constables, the substance of which is as follows: that the justices of the peace, in their several divisions, shall annually issue precepts to the overseers of every parish therein, requiring them to return a list of a competent number of men within such parish qualified and liable to serve as constables, in which (generally, but subject to numerous exceptions) is included every able-bodied man there resident, between twenty-five and fifty-five years of age, rated to the poor rate or county rate, or any tenant to the value of 4*l.* per annum; that the justices, at a special petty sessions of the peace to be holden for that purpose, shall revise such list and choose therefrom such number of persons as they deem necessary, having regard to the extent and population of the parish; but that no person who has already served shall be liable to do so again till every other person liable shall have served, either in person or by substitute; that every person so chosen shall take the oath of office prescribed by the act, and serve for a year, or until another shall be appointed in his stead; and that in case of his refusal to do so, shall incur such penalties as in the act provided; that fees (payable out of the poor rate) shall be allowed to the constables for services of summonses and execution of warrants, and such other occasional services as the justices shall think fit, according to a table to be settled by the justices at quarter sessions, and approved by a secretary of state; that every parish, if the vestry so resolve, may have constables appointed, with a salary payable out of the poor rate; and that all constables appointed under the act shall have within their county, and also within all

lice district, see the Metropolis Police Acts, above cited, p. 40 (u.); and as to those in boroughs, see the Mu-

nicipal Act, 5 & 6 Will. 4, c. 76, ss. 76, 77, 82, 86.

liberties, and franchises, and detached parts of other counties situated therein, and also in every county adjoining, all the powers and privileges, and be liable to all the duties and responsibilities, which a constable before enjoyed or was subject to within his constablewick, but shall not be bound to act beyond his own parish without the special warrant of a justice of the peace. It is also provided, that it shall be lawful for the justices of the peace in quarter sessions (if they think fit) to order, that lock-up houses, under the charge of superintending constables, shall be provided in such places within their county as they may deem expedient, and that the expense of providing and furnishing them shall be defrayed out of the county rates; and that where a superintending constable is so appointed, the ordinary parochial constable shall be subject to his authority. But no lock-up house shall be provided, except upon such plan as shall be approved by a secretary of state, and every such house shall be under the supervision of the inspectors of prisons.

Besides the high and petty, there are also *special* constables, being persons appointed by the magistrates to execute warrants on particular occasions (*i*); and by 1 & 2 Will. IV. c. 41, and 5 & 6 Will. IV. c. 43, if it be made to appear to any two justices of the peace, upon the oath of a credible witness, that any tumult, riot or felony has taken place, or may be reasonably apprehended, and if they be of opinion that the ordinary officers are insufficient, they may appoint and swear in as many householders or others as they may think fit (having no legal exemption from the office of constable), to act as special constables for a limited time, for some particular parish, township, or place; or the lord lieutenant may, by direction of one of the principal secretaries of state, cause special constables to be appointed to act for the whole county, or any portion thereof; and in either case any privilege of exemption may, by order of government, be

(i) 41 Geo. 3, c. 78.

disallowed. The powers of a special constable, under these acts, are equivalent to those of an ordinary constable; but the rule of qualification is not the same, for by the express provision of the later of the two statutes above referred to, it is not necessary that the former should be resident within the district or place for which he is to act.

It is moreover provided by 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, passed for the establishment of *county* and *district* constables, that in all cases where it shall be made to appear to the justices of the peace of any county in quarter sessions assembled, that the ordinary officers appointed for preserving the peace are not sufficient, it shall be lawful for them to report the same to one of the principal secretaries of state, declaring how many are needed within the county, and the rates of payment which it would be expedient to provide for them; provided always, that the number shall not be more than one man for every 1000 of the inhabitants. Also, that as soon as the justices shall have received from the secretary of state, such rules as it shall be deemed expedient to make for the government, pay, clothing, accoutrements and necessities of the constables required, the justices shall, subject to the secretary of state's approbation, appoint a chief constable; and that the chief constable may, subject to the approbation of two or more justices in petty sessions assembled, appoint the other constables required, and also a superintendent to be at the head of the constables in each division; and at his pleasure may dismiss all or any of them, subject to the orders he may receive from the justices in quarter sessions, and to the rules established for the government of the force. It is also enacted by these acts, that the salaries and allowances of the chief and other constables, and all expenses incurred in putting the same into execution, shall be paid out of a police rate, to be made by the justices at quarter sessions, and that it shall be lawful for the justices of any county in which constables shall have been so

appointed, and for the council of any incorporated borough situated in or adjoining to such county, to agree together for the consolidation of the county and borough police establishments.

Another branch of the police of the realm, closely connected with the subject under discussion, consists of *watchmen*, or guardians of the peace, by night (*j*). These were antiently only the deputies or assistants of the constable, and were appointed by him (*k*). But watchmen have, in modern times, been appointed without the constable's intervention, being employed and paid by particular parishes, or sometimes by private individuals, with the view of obtaining a more effectual protection to person and property than can be otherwise afforded. The authority of watchmen, in this modern sense, is recognized by law (*l*); and by the statute 3 & 4 Will. IV. c. 90, (amended by 3 & 4 Vict. c. 88, s. 20,) regulations are made for the watching and lighting of such parishes as are disposed to the introduction of such improvements at their own expense (*m*). It is provided, that, upon the application of three or more rate-payers (*n*), a meeting of that class of the inhabitants may be convened, by whom (or by the rate-payers at large, if a general poll shall be demanded,) it shall be determined whether the provisions of the act shall be adopted (*o*). In the event of their adoption, inspectors are to be appointed for carrying them into effect (*p*), who are accordingly empowered to appoint from time to time such number of watchmen, patrols, and other persons, for the protection of the inhabitants by day and night, as they shall think sufficient, and to give rewards for apprehending felons and others, and to defray the expenses of parish prosecutions (*q*).

(*j*) Vide sup. p. 47, n.

(*k*) 1 Bl. Com. 357.

(*l*) 2 Hale, P. C. 98; 3 Inst. 52;
9 Rep. 66.

(*m*) As to watching and lighting in boroughs, see Municipal Act, 5 & 6 Will. 4, c. 76, s. 76, 77, 82, 86, 88;

7 Will. 4 & 1 Vict. c. 78, s. 29,
c. 81, s. 3.

(*n*) Sect. 6.

(*o*) Sect. 8, 9.

(*p*) Sect. 8.

(*q*) Sect. 39.

The watchmen and patrols so appointed are to be sworn in as constables, and to act as such, with powers and privileges equally extensive (*r*); and such beats and rounds are to be assigned to them, and such wages allowed, as the inspectors may deem expedient (*s*). The inspectors are also authorized to put up lamps for lighting the streets with gas or otherwise, and to provide fire engines for the use of the parish (*t*). And it is farther provided, that the expenses incurred in the performance of all these duties, shall be defrayed by rates to be levied by the overseers, under orders of the inspector, on the owners and occupiers of property in the parish rateable to the relief of the poor (*u*). But the total amount to be levied for such purpose in any one year, is not to exceed the limit which may have been previously fixed by an annual vote of the rate payers (*x*).

(*r*) Sect. 42.

(*u*) Sect. 32, 33,

(*s*) Sect. 39.

(*x*) Sect. 33, 39.

(*t*) Sect. 44, 45.

PART II.

OF THE CHURCH.

HAVING now finished our examination of that division of public rights which concerns the relation between persons in *civil* authority, and those who are subject to that authority, which involved the whole law relating to the *state* or *civil* government, we are next to turn our attention to such public rights as are connected with the relation between those who have power in matters *ecclesiastical*, and those over whom that power is exercised,—which latter subject we shall discuss, as proposed in a former place (*a*), under the general head of the *Church*.

The Church, in that sense of the term to which these Commentaries refer, may be defined as an institution established by the law of the land, in reference to religion; in treating of which we shall find it convenient to consider, *first*, the authorities established in the Church; *secondly*, the law relating to its doctrines, worship, and discipline; *thirdly*, the law relating to its benefices or endowments.

(*a*) Vide sup. vol. ii. p. 346.

CHAPTER I.

OF THE ECCLESIASTICAL AUTHORITIES.

THE ecclesiastical authorities consist (under the sovereign, the common head of the Church) principally of the *clergy*, (a venerable body of men set apart from the rest of the people or *laity*,) in order to superintend the public worship of Almighty God and the other ceremonies of religion, and to administer spiritual counsel and instruction.

The clergy consist of such, and such only, as have been admitted into *holy orders*; which, in the Church of England, are the orders of bishops (including archbishops), priests, and deacons (*a*); and the ordination in that church must take place according to the form prescribed in the Book of Common Prayer (*b*). By 13 Eliz. c. 12, and 44 Geo. III. c. 43, it is provided (conformably to the canons), that none shall be ordained deacon under twenty-three years, nor priest under twenty-four years, of age; though as to deacons, the Archbishop of Canterbury has the privilege of admitting them (by faculty or dispensation) at an earlier period. Also by the same statute of Elizabeth, none shall be ordained either priest or deacon, without first subscribing the Thirty-nine Articles of religion; nor by 1 Eliz. c. 1,

(*a*) The Roman canonists had the orders of bishop (in which the pope and archbishops were included), priest, deacon, subdeacon, psalmist, acolythe, exorcist, reader, ostiarius. Corv. Jus Canon. 38, 39; Gibs. Cod. 115.

(*b*) See 3 Burn's Eccl. Law, 103; Wats. C. L. ch. xiv. By 59 Geo. 3, c. 60, s. 3, no person ordained by a

foreign bishop, can officiate without special permission from the archbishop of the province, or be admitted to a benefice, without consent both of archbishop and bishop. By the same statute, deacons and priests may be ordained by our bishops, for the colonies.

and 1 Will. & Mar. c. 8, without first taking the oaths of allegiance and supremacy (*c*). Moreover, by the canon law (*d*), no person shall be admitted into holy orders without a *title* (as it is called); that is, unless he produce to the bishop a presentation to some ecclesiastical living within the diocese, or such certificate of preferment or provision as in the canon described; or unless he be a fellow or chaplain in Cambridge or Oxford, or master of arts of five years' standing in such university, and living there at his own charge; or unless the bishop himself intends shortly to admit him to some benefice or curacy. And we may observe farther, that, [by 31 Eliz. c. 6, if any person obtain orders or a licence to preach by money or corrupt practices, (which seems to be the true, though not the common notion of simony), the person giving such orders shall forfeit 40*l.*, and the person receiving, 10*l.*; and the latter is incapable of any ecclesiastical preferment for seven years afterwards.]

In order to attend the more closely to their duties, the clergy have certain privileges, [and had formerly much greater, which were abridged at the time of the Reformation, on account of the ill use which the popish clergy had endeavoured to make of them; for the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie (*e*). But it is observed by Sir Edward Coke (*f*), that as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not, those which of right belonged to them.] The personal exemptions do indeed in several instances continue. [A clergyman cannot be compelled to serve on

(*c*) By 24 Geo. 3, c. 35, the Bishop of London, or other bishop by him appointed, may ordain aliens to exercise the office of deacon or priest out of the dominions of the crown, without the oath of allegiance.

(*d*) Can. 33; Wats. C. L. 147.

(*e*) The marriage of the clergy was, in the time of popery, prohibited; but the prohibition was taken away by 2 & 3 Edw. 6, c. 21.

(*f*) 2 Inst. 4.

[a jury (*g*); nor can he be chosen to any temporal office, as bailiff, reeve, constable, or the like; in regard of his own continual attendance on the sacred function (*h*). During his attendance on divine service,] *eundo, morando, et redeundo*, [he is privileged from arrests in civil suits (*i*),] and the glebe and tithes of his parsonage are not liable to execution for debt, in the same manner as lay property, but to a sequestration, by which the churchwardens are directed to levy the debt, after making provision for the service of the church (*j*). [But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations.] By 41 Geo. III. c. 63, they are incapable of being elected members of the House of Commons (*k*); and by 5 & 6 Will. IV. c. 76, s. 28, of being councillors or aldermen in boroughs. They are also prohibited from farming or trading; for by 1 & 2 Vict. c. 106, s. 28—30, (repealing some former acts on this subject,) no spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or allowed to perform the

(*g*) 6 Geo. 4, c. 50, s. 2. He is also, by the statute of Marlbridge, 52 Hen. 3, c. 10, discharged from attendance upon courts leet and the sheriffs' tourns; (antient courts of criminal jurisdiction, now almost superseded by the court of quarter sessions.) F. N. B. 160; 2 Inst. 4.

(*h*) Finch, L. 88.

(*i*) Stat. 50 Edw. 3, c. 5; 1 Ric. 2, c. 15; 29 Car. 2, c. 7, s. 6; 9 Gen. 4, c. 31, s. 23; 12 Rep. 100; *Goddard v. Harris*, 7 Bing. 320.

(*j*) *Ex parte Meymott*, 1 Atk. 200; *Burn's E. L. Sequestration*; *Arbuckle v. Cowtan*, 3 Bos. & Pul. 326; *Marsh v. Fawcett*, 2 H. Bl. 582. See also p. 9, n., *supra*, as to the privilege, now abolished, of the *benefit of clergy*. This was antiently allowed to the clergy alone; and, even till its abo-

lition, was allowed to them in a more beneficial sense than to laymen; as a clergyman might have it without any corporal punishment whatever, and might have it more than once—neither of which was permitted to laymen, 1 Bl. Com. 377; 4 Bl. Com. 372.

(*k*) *Vide sup.* vol. ii. p. 391. Upon the controverted question, as to the eligibility of clergymen prior to the stat. 41 Geo. 3, c. 63, Blackstone was of opinion that they were ineligible; assigning as the reason, that they sit in *convocation*. But that reason, as has been justly remarked, is unsatisfactory. See Coleridge's *Black.* vol. i. p. 175. And the authorities were, on the whole, in favour of their eligibility, *vide case of the Borough of Newport*, 2 Luders, 269.

duties of any ecclesiastical office, shall take to farm for occupation by himself, any lands exceeding eighty acres in the whole, without permission in writing from the bishop of the diocese; nor shall such spiritual person, by himself or any other to his use, carry on any trade or dealing for profit, unless it be carried on by more than six partners, or his share in it shall have devolved to him by inheritance, or other such representative title as in the act specified; and even in these excepted cases it is illegal for him to act as director or managing partner, or to carry on the trade in person (*k*). But notwithstanding these prohibitions, the act allows him to carry on the business of a schoolmaster, or to deal with booksellers as to the sale of books, or to be a managing director, partner, or shareholder in any benefit society, or fire or life-insurance society, or to buy or sell to the extent necessarily incidental to his lawful occupation of land, or to sell minerals the produce of his land, provided that none of these transactions be conducted in person, in any market or place of public sale.

[In the frame and constitution of ecclesiastical polity there are divers ranks and degrees, which we shall consider in their respective order, merely as they are taken notice of by the secular laws of England, without intermeddling with] any matters merely spiritual, such as the spiritual distinction between priests and deacons, or [the canons and constitutions, by which the clergy have bound themselves.]

I. An archbishop or bishop is constituted by election, confirmation, consecration, and installation; though an

(*k*) Spiritual persons had been restrained from trading by previous statutes; and among others by 57 Geo. 3, c. 99; and it was held, that a contract made by a banking company, of which spiritual persons happened

to be members, was void by the effect of that statute. *Hall v. Franklin*, 3 Mee. & W. 259. But on this subject, see now 1 & 2 Vict. c. 10; 4 & 5 Vict. c. 14.

archbishop is more properly said to be enthroned and not installed (*l*).

The election of an archbishop or bishop is by the [chapter of his cathedral church, by virtue of a licence from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair, throughout all christendom; and this was promiscuously performed by the laity as well as the clergy (*m*), till at length it becoming tumultuous, the emperors and other sovereign of the respective kingdoms of Europe took the appointment in some degree into their own hands, by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalities, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A. D. 773, by Pope Hadrian I. and the Council of Lateran (*n*), and universally exercised by other Christian princes; but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy; which at length was completely effected; the mere form at election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England (*o*), (as well as other

(*l*) Bishop of St. David's *v.* Lucy, 1 Salk. 137; 3 Salk. 72. As to archbishops and bishops, vide sup. vol. i. p. 108; vol. ii. p. 358; see also 5 & 6 Vict. c. 26, as to providing episcopal houses of residence; 6 & 7 Vict. c. 62, as to providing for performance of episcopal functions in case of incapacity; 6 Geo. 4, c. 88, and 5 & 6 Vict. c. 4, as to the establishment

of bishops and archdeacons for the West India Colonies; 26 Geo. 3, c. 84, as to the consecration of bishops for foreign parts.

(*m*) *Per clerum et populum*, Palm. 25; *Sobran v. Kevan*, 2 Roll. Rep. 102; *M. Paris*, A. D. 1095.

(*n*) Decret. 1, dist. 63, c. 22.

(*o*) Palm. 28.

[kingdoms in Europe,) even in the Saxon times, because the rights of confirmation and investiture were in effect, though not in form, a right of complete donation (*p*). But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring and pastoral staff or crosier,—pretending that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction; and Pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them (*q*). This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for awhile its other pretensions (*r*).

This concession was obtained from King Henry I. in England, by means of that obstinate and arrogant prelate, Archbishop Anselm (*s*); but King John, about a century afterwards, in order to obtain the protection of

(*p*) "*Nulla electio prælatorum (sunt verba Ingulphi) erat merè libera et canonica; sed omnes dignitates, tam episcoporum, quàm abbatum, per annulum et baculum regis curia pro sua complacentia conferebat.*" *Pence clericos et monachos fuit electio, sel*

electum a rege postulabant. Selden, Jan. Ang. l. i. s. 39.

(*q*) Decret. 2, caus. 16, qu. 7, c. 12 et 13.

(*r*) Mod. Un. Hist. xxv. 363; xxix. 115.

(*s*) M. Paris, A. D. 1107.

[the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; reserving only to the crown, the custody of the temporalities during the vacancy, the form of granting a licence to elect, (on refusal whereof the electors might proceed without it,) and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause (*t*). This grant was expressly recognised and confirmed in king John's *Magna Charta* (*u*), and was again established by statute 25 Edw. III. st. 6, s. 3.]

But by statute 25 Hen. VIII. c. 20 (*v*) the law was again altered, and the right of nomination secured to the crown; [it being enacted that at every future avoidance of a bishopric, the king may send the dean and chapter his usual licence to proceed to election,] or, *congé d'élire*, [which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect; and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters patent appoint such person as he pleases (*x*). This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected; which they are bound to perform immedi-

(*t*) M. Paris, A. D. 1214; 1 Rym. Fœd. 198.

(*u*) Cap. 1, edit. Oxon. 1759.

(*v*) This statute was repealed by 1 Edw. 6, c. 2, which declared that the collation and gift of all bishoprics appertained to the king. But the 1 Edw. 6 being afterwards repealed by 1 Mary, st. 2, c. 2, and 1 Eliz. c. 1, the statute of Hen. 8 was consequently revived, 12 Rep. 7; Com. Dig. Ec-

clesiastical Persons, C. 2.

(*x*) It is directed in the form of consecrating bishops, confirmed by various statutes since the Reformation, that a bishop, when consecrated, must be full thirty years of age; but there seems to have been no restriction of this kind in antient times.—Christian's Blackstone, vol. i. p. 379, cites Godw. Comm. de Præsul. 693.

[ately, without any application to the see of Rome. After which, the bishop elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*,] that is, the loss of all civil rights, forfeiture of lands, goods and chattels, and imprisonment during the royal pleasure(*y*). It is to be observed, however, that the mode here described of appointing bishops applies only to such sees as are of old foundation. The five new bishoprics created by Henry VIII., viz. Bristol and Gloucester (now united), Chester, Peterborough, and Oxford, have been always donatives, and conferred by letters patent from the crown(*z*); and the case is the same as to the bishopric of Ripon, now recently created(*a*).

There are two archbishops(*b*) for England and Wales; the Archbishop of Canterbury, who has within his province all the bishoprics, (which are at present twenty-five in number), except Chester, Durham, Carlisle, Ripon, and the Isle of Man; and the Archbishop of York, whose province comprises the five bishoprics just named.

[An archbishop is the chief of the clergy in a whole province, and has the inspection of the bishops of that province, as well as of the inferior clergy,] whom he has power for that purpose to *visit*(*c*). He confirms the election

(*y*) 4 Bl. Com. 117.

(*z*) Co. Litt. 134 a, n. (5). The case is the same as to the Irish bishoprics, which are made donative by the Irish statute, 2 Eliz. c. 4; *ibid*.

(*a*) See 6 & 7 Will. 4, c. 77.

(*b*) Antiently there were three archbishoprics, the third being of Caerleon, in Wales; but in the time of Henry I. both that see and all Wales became

subject to the Archbishop of Canterbury. Rogers's Eccl. L. 105. The Archbishop of Canterbury was antiently Primate of Ireland also. Ireland had no archbishop of its own till 1152. *Ibid*. 106.

(*c*) See Bishop of St. David's *v.* Lucy, 1 Salk. 134; *Re* Dean of York, 2 Ad. & El. N. S. 1.

of the bishops, and afterwards consecrates them (*d*). He [has also his own diocese, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal (*e*). As archbishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet him in convocation; but without the king's writ he cannot assemble them (*f*). To him,] as a superior ecclesiastical judge, [all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person, to him in person, so it also lies from the consistory courts of each diocese, to his archiepiscopal court:] in addition to which he has also a court of original jurisdiction (*g*). [During the vacancy of any see in his province, he is guardian of the spiritualties thereof, as the king is of the temporalities, and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of Prior of Canterbury was abolished at the Reformation (*h*). The archbishop is entitled to present by lapse, to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop (*i*); in lieu of which it is now usual for the bishop

(*d*) 2 Rol. Ab. 223.

(*e*) The *secular* jurisdiction formerly belonging to the Archbishop of York and Bishop of Ely, was abolished by 6 & 7 Will. 4, c. 87; 7 Will. 4 & 1 Vict. c. 53; that belonging to the bishop of Durham, by 6 & 7 Will. 4, c. 19.

(*f*) 4 Inst. 322, 323.

(*g*) As to the Archbishop's Courts, vide sup. vol. ii. p. 238; post, Book V.

(*h*) 2 Rol. Abr. 22.

(*i*) "Bishops are styled *suffragan*

"in respect of their relation to the
 "archbishop of their province. But
 "formerly each archbishop and bishop
 "had also his suffragan to assist him
 "in conferring orders, and in other
 "spiritual parts of his office within
 "his diocese. These, in our ecclesi-
 "astical law, are called suffragan
 "bishops, and resemble the *chore-*
 "*piscopi*, or *bishops of the country*, in
 "the early times of the Christian
 "church. How this inferior order of
 "bishops may be elected and conse-
 "crated is regulated by 26 Hen. 8,

[to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose, which is therefore called his *option* (*i*); which options are only binding on the bishop himself who grants them, and not on his successors (*j*). The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury (*k*). And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces*; whereby the emperor exercises, and hath immemorially exercised (*l*), a right of naming to the first prebend that becomes vacant after his accession in every church of the empire (*m*). A right that was also exercised by the crown of England in the reign of Edward I. (*n*), and which probably gave rise to the royal

" c. 14; but notwithstanding this statute, it is not usual to appoint them.
 " This should not be confounded with
 " the *coadjutors* of a bishop; the latter
 " being appointed in case of a bishop's
 " infirmity to superintend his *jurisdiction*
 " and *temporalities*, neither of
 " which was within the interference
 " of the former. See fully on this
 " subject in 1 Gibs. Cod. 1sted. 155."
 —Co. Litt. by Harg. 94 a, note (3).

(*i*) Cowel's Interp. tit. Option.

(*j*) These options become the private patronage of the archbishop, and upon his death are transmitted to his personal representatives; or the archbishop may direct by his will whom, upon a vacancy, his executor shall present; which direction, according to a decision in the House of Lords, his executor is compellable to observe. 1 Burn's Eccl. Law, 226. If a bishop dies during the vacancy of any benefice within his patronage, the presentation devolves to the crown; so like-

wise if a bishop dies after an option becomes vacant, and before the archbishop or his representative has presented, and the clerk is instituted, the crown *pro hac vice* will be entitled to present to that dignity or benefice. Potter v. Chapman, Amb. 101. For the grant of the option by the bishop to the archbishop has no efficacy beyond the life of the bishop.—Christian's Blackstone, vol. i. p. 381.

(*k*) Sherlock of Options, 1.

(*l*) Goldast. Constit. Imper. tom. 3, p. 406.

(*m*) Dufresne, v. 806; Mod. Univ. Hist. xxix. 5.

(*n*) Rex, &c. *salutem: Scribatis episcopo Karl.—quod Roberto de Icard pensionem suam, quam ad preces regis prædicto Roberto concessit, de cætero solvant; et de proxima ecclesia vacatura de collatione prædicti episcopi, quam ipse Robertus acceptaverit, respiciat.*—Brev. 11 Edw. 1; 3 Pryn. 1261.

[corodies,] viz. the king's right (now fallen into disuse) of sending one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promoted him to a benefice (*o*). [It is likewise the privilege, by custom, of the Archbishop of Canterbury, to crown the kings and queens of this kingdom (*p*). And he hath also by the statute 25 Hen. VIII. c. 21 (*q*), the power of granting dispensations in any case, not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them; which is the foundation of his granting special licences to marry at any place or time,] or his giving dispensation [to hold two livings, and the like (*r*); and on this also is founded the right he exercises of conferring degrees,] called Lambeth degrees (*s*), [in prejudice of the universities (*t*).] In unaccustomed cases, however, the archbishop has no power to grant dispensations, but must refer the matter to the sovereign in council (*u*).

A bishop is the chief of the clergy within a diocese (*v*); but is subordinate to the archbishop of the province, to whom he is sworn to pay due obedience (*x*). His dignity is usually called a see (*sedes*), and his church a cathedral (*y*).

(*o*) 1 Bla. Com. 283.

(*p*) It is said that the Archbishop of York has the privilege to crown the queen consort, and to be her perpetual chaplain. 1 Burn's Eccl. Law, 178. —Christian's Blackstone, *ubi sup*.

(*q*) Et vide 28 Hen. 8, c. 16. As to dispensations, see Colt and Glover v. Bishop of Lichfield and Coventry, Hob. 147.

(*r*) The power of the Archbishop of Canterbury to grant special licences to marry is now recognized by 4 Geo. 4, c. 76, s. 20, and his power to grant dispensations to hold two livings, by 1 & 2 Vict. c. 106, s. 6.

(*s*) Although the archbishop can confer all the degrees which are taken in the universities, yet the graduates of the two universities, by various acts

of parliament and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree.—Christian's Blackstone, vol. i. p. 381.

(*t*) See the Bishop of Chester's case, Oxon. 1721.

(*u*) 25 Hen. 8, c. 21, s. 5.

(*v*) As to dioceses, vide *sup*. vol. i. p. 108.

(*x*) See preamble to 26 Geo. 3, c. 84.

(*y*) As to the government of cathedrals and collegiate churches, see 6 Ann. c. 21; 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39. We may remark here, that a *collegiate church* is a church consisting of a body corporate of dean and canons, such as Westminster, Windsor, &c., independently of any cathedral.

Among the principal powers which he exercises are those of ordaining priests and deacons (*z*), consecrating churches, and [inspecting the manners of the people and clergy (*a*),] for which purpose [he may visit at pleasure every part of his diocese.] He is also an ecclesiastical judge (*b*): but [his chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law (*c*).] In case of complaint, however, against a clerk in holy orders, for any ecclesiastical offence, under the Church Discipline Act, 3 & 4 Vict. c. 86, the bishop holds a court in his own person, assisted by three assessors, of whom the dean of his cathedral, or one of his archdeacons, or his chancellor, shall be one, and a serjeant at law, or advocate who has practised five years in the court of the province, or a barrister of seven years' standing, another. [It is also the business of a bishop to institute, and to direct induction, to all ecclesiastical livings in his diocese,] and to license curates, and to regulate their salaries (*d*).

[Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior (*e*). Therefore a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.]

The claims of the crown on archbishoprics and bishoprics, in respect of the custody of the temporalities, and in respect of the first fruits and tenths of all spiritual preferments, including archbishoprics and bishoprics, have been already noticed in a former part of the work (*f*). They

(*z*) See 59 Geo. 3, c. 60, as to ordination of deacons or priests for the colonies.

(*a*) See *Re Dean of York*, 2 Ad. & El. N. S. 1.

(*b*) Vide *sup.* vol. ii. p. 237; et vide post, Book V.

(*c*) Vide *Godolph. Ab.* 82.

(*d*) 1 & 2 Vict. c. 106, s. 77. See

3 & 4 Vict. c. 33, authorizing the bishops of England or Ireland to permit clergy of the Protestant episcopal Church in Scotland, or the United States, to officiate in their respective dioceses.

(*e*) *Gibs. Cod.* 822.

(*f*) Vide *sup.* vol. ii. p. 545, 547.

need not, therefore, be again discussed in this place. We may mention however here, that when any spiritual person is made a bishop, all the preferments of which he was before possessed become in general, upon his consecration, void, and the sovereign may present to them by his prerogative royal (*g*).

[II. A dean and chapter (*h*) are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see (*i*). When the rest of the clergy were settled in the several parishes of each diocese (as hath formerly (*h*) been mentioned), these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean (*l*).]

The chapter, who, as distinct from the dean, consist of certain dignitaries called canons (*m*), [are sometimes appointed by the crown, sometimes by the bishop, and sometimes by each other (*n*).] And the antient deans were formerly elected by the chapters, by *congé d'élire* from the crown, and letters missive of recommendation, in the

(*g*) 1 Bl. Com. 383; Basset v. Gee, Cro. Eliz. 790; Att.-Gen. v. Bishop of London, 4 Mod. 210; Grocers' Company v. Abp. of Canterbury, 2 W. Bl. 770. It is laid down also by Sir E. Coke, 2 Inst. 491, that on the death of every prelate in England, the crown is intitled to six things, viz. the bishop's best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and cover; his gold ring; and lastly, his *muta canum*, his mew, or kennel of hounds, 2 Bl. Com. 426. This is considered by Blackstone as in the nature of a *mortuary*; but Lord Coke says it was a *fine* to the crown for empowering the bishops to grant probates, &c. vide *Mirehouse v. Rennell*, 8 Bing. 497.

(*h*) See various provisions for new arrangements in cathedrals and collegiate churches, 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39.

(*i*) Dean and Chapter of Norwich's case, 3 Rep. 75; Co. Litt. 103, 300.

(*k*) Vide sup. vol. i. p. 111.

(*l*) This, says Blackstone, was probably because he was at first appointed to superintend *ten* canons or prebendaries.

(*m*) By 3 & 4 Vict. c. 113, s. 1, all the members of chapters, except the dean, in every cathedral and collegiate church in England, shall be styled canons.

(*n*) See 3 & 4 Vict. c. 113, s. 24, 26; 4 & 5 Vict. c. 39, as to the right of appointment to certain canonries.

same manner as bishops; but in those chapters that were founded by Hen. VIII. out of the spoils of the dissolved monasteries, the deanery has always been donative, and the installation merely by letters patent from the crown (*o*). And now this is the course also with respect to the antient deaneries; it being provided by 3 & 4 Vict. c.113, that every such deanery (except in Wales) shall thenceforth be in the direct patronage of her Majesty, who may, on the vacancy thereof, appoint by letters patent a spiritual person to be dean (*p*). And by the same act it is farther provided, that no person shall hereafter be capable of receiving the appointment of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders (except in the case of a canonry annexed to any professorship, headship, or other office in any university (*q*);) that the dean shall reside for at least eight months in the year (*r*); that the term of a canon's residence shall be at least three months in the year (*s*); that the right of appointing a regulated number of *minor* canons, with salaries, shall in future be in all cases vested in the respective chapters (*t*); and that *honorary* canons (without emolument) shall be established in every cathedral church in which there are not already founded any non-residentiary prebends, dignitaries, or officers, and shall be in the gift of the archbishops and bishops respectively (*u*).

[The dean and chapters are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary (*x*), and immediate superior; and has, generally speaking, the power of *visiting* them (*y*); and correcting

(*o*) See the learned note by Mr. Hargrave, Co. Litt. 95; 1 Bl. Com. 383.

(*p*) Sect. 24.

(*q*) Sect. 27.

(*r*) Sect. 3.

(*s*) Ibid.

(*t*) Sect. 45.

(*u*) Sect. 23.

(*x*) The Ordinary (*ordinarius*) is a

name taken from the canonists, and applied to a bishop, or any other that hath ordinary jurisdiction in causes ecclesiastical. He is so called *quia habet ordinariam jurisdictionem, in jure proprio, et non per deputationem*. Co. Litt. 96 a.

(*y*) See Re Dean of York, 2 Ad. & El. N. S. 1.

[their excesses and enormities. They had also a check on the bishop at common law : fortill the statute 32 Hen. VIII. c. 28,] (which enabled him to grant leases not exceeding twenty-one years or three lives, on his sole authority,) [his grant or lease would not have bound his successors, unless confirmed by the dean and chapter (z).

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation to either the king or the bishop (a).

III. An archdeacon (b) hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, in some particular part of the diocese. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop but now independent and distinct from his (c). He therefore *visits* the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance (d).] In general, however, (and subject to exception in the case of particular archdeaconries,) the jurisdiction of the archdeacon and the bishop are *concurrent*, so that a suit may be commenced in the court of either (e).

[IV. The rural deans are very antient officers of the church (f), but almost grown out of use; though their deaneries still subsist as an ecclesiastical division of the

(z) Co. Litt. 44 a, 103 a.

(a) Grendon v. Bishop of Lincoln, Plowd. 498.

(b) As to the ecclesiastical division of dioceses into archdeaconries, of archdeaconries into rural deaneries, and of rural deaneries into parishes, vide sup. vol. i. p. 108.

(c) 1 Burn's Eccl. Law, 68, 69.

(d) By 6 & 7 Will. 4, c. 77, s. 19, it is provided that all archdeacons throughout England and Wales should

have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding. And see 6 & 7 Will. 4, c. 77; 3 & 4 Vict. c. 113; and 4 & 5 Vict. c. 39, for provisions as to the endowment and arrangement of archdeaconries.

(e) Rogers's Ecc. Law, 60. See farther as to the archdeacon's court, post, Book V.

(f) Kennett, Par. Antiq. 633.

[diocese, or archdeaconry (*g*). They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority (*h*).

V. The next, and indeed the most numerous, order of men in the system of ecclesiastical polity, are the parsons and vicars of churches: in treating of whom, we shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, show how one may cease to be either.

1. A *parson*, *persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church (*i*). He is called parson, *persona*, because by his person the church, which is an invisible body, is represented.] [He is sometimes called the *rector*, or governor, of the church: but the appellation of *parson* (however it may be depreciated by familiar, clownish, and indiscriminate use), is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, (Sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiæ gerere*. A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single

(*g*) See 6 & 7 Will. 4, c. 77, s. 1; and 3 & 4 Vict. c. 113, s. 32.

(*h*) Gibs. Cod. 972, 1550.

(*i*) As to parishes and parochial churches, vide sup. vol. i. p. 108—114.

[private clergyman (*k*).] It will be proper, however, to examine more closely the doctrine of appropriation, with which the law of *vicars* is closely connected.

[This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a four-fold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's licence, and consent of the bishop, must first be obtained: because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to anything that shall be to the prejudice of the church. The consent of the patron also is necessarily implied, because (as was before observed) the appropria-

(*k*) The subject of appropriation is fully explained in Burn's Ecc. L. in tit.; Wats. C. L. 191; Grendon v.

Bishop of Lincoln, Plowd. 493; Duke of Portland v. Bingham, 1 Hagg. Consist. Rep. 162.

[tion can be originally made to none, but to such spiritual corporation as is also the patron of the church ; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church (*m*). When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church ; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons (*n*).]

Appropriators were thus in their origin always persons spiritual, being bishops, prebendaries, monasteries, and other religious houses, [nay, even nunneries, and certain military orders ; all of which were spiritual corporations.] But the case is now different ; for by 27 Hen. VIII. c. 28, and 31 Hen. VIII. c. 13, the monasteries and religious houses were dissolved, and the appropriations which belonged to them respectively, [amounting to more than one-third of all the parishes in England (*o*),] were given to the king in as ample a manner as the bishops, &c. formerly held the same at the time of their dissolution ; (a proceeding which, [though perhaps scarcely defensible, was not without example,] for the same thing was done in former reigns with respect to the alien priories, (that is, such as were filled by foreigners only (*p*)) ;) and many of the appropriations so vested in the crown by the effect of these several dissolutions, being afterwards from time to time granted out by the crown to subjects, are now in the hands of lay persons, who are usually styled, by way of distinction, *lay impropriators*, though the term of *appropriators* is in strictness as applicable to these as to the original holders (*q*).

(*m*) *Grendon v. Bishop of Lincoln*,
Plowd. 496—500.

(*n*) *Wright v. Gerard*, Hob. 307.

(*o*) *Seld. Review of Tithes*, c. 9 ;
Spelm. Apology, 35.

(*p*) 2 Inst. 584.

(*q*) *Vide Burn's Eccl. Law*, vol. i.
66 ; *Christian's Blackstone*, vol. i. 388,
(*n.*) ; *Spelm. Tithes*, c. 29.

Appropriations of either class are capable, it is held, of being severed, so that the church may become disappropriate; and that in [two ways: as first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation being once severed, can never be re-united again, unless by a repetition of the same solemnities (r).] Secondly, [if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.]

In all appropriations there is generally a spiritual person attached to the same church, under the name of *vicar*, to whom the spiritual duty, or *cure of souls* (as it is termed), belongs, in the same manner, as in personages not appropriated (or rectories) to the rector: and to whom, on the other hand, a certain portion of the tithes or other emoluments of the church, by way of exception out of those enjoyed by the appropriator, is assigned. The origin of these vicars (s) is as follows:

[The appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar* (t). His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere* (u). But this

(r) Co. Litt. 46.

(s) As to vicarages, see 40 Edw. 3, pl. 27; Britton v. Wade, Cro. Jac. 516; Spelm. Tithes, 153; Bird v. Relph, 2 Ad. & El. 780; Rogers's Eccl. L. 890.

(t) Grendon v. Bishop of Lincoln,

ubi sup.; Seld. c. 11, s. 1. It would seem that such ministers existed as long ago as the reign of Hen. 2, but they are said to have been then few in number. Bird v. Relph, ubi sup.

(u) Seld. Tith. c. 11, 1.

[was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose; and accordingly it is enacted by statute 15 Rich. II. c. 6, that in all appropriations of churches, the diocesan bishop shall ordain, (in proportion to the value of the church,) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12, it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality (x). The endowments in consequence of these statutes have usually been by a portion of the glebe or lands belonging to the personage, and a particular share of the tithes, which the appropriators found it most troublesome to collect;] the greater part [being still reserved to their own use. But

(x) "From this act we may date
 "the origin of the *present* vicarages;
 "for before this time the vicar was
 "nothing more than a temporary
 "curate, and when the church was
 "appropriated to a monastery, he was
 "generally one of their own body,
 "that is, one of the *regular* clergy;
 "for the monks, who lived *secundum*

"*regulas* of their respective houses or
 "societies, were denominated *regular*
 "clergy, in contradistinction to the
 "parochial clergy, who performed
 "their ministry in the world, in
 "*seculo*, and who from thence were
 "called *secular* clergy."—Christian's
 Blackst.

[one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally and some more scantily endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.]

Such is the history of the distinction between rectors and vicars, the law on which subject may be summarily stated thus. Of parochial churches some have been appropriated, others have not: of the non-appropriated (called *rectories*) there is no vicar, but a rector only, who is of necessity a spiritual person, and has the cure of souls in the parish (*y*), with the exclusive title to all the emoluments: of the appropriated, there is generally, besides the rector or appropriator, a vicar: and in churches so circumstanced, (termed *vicarages*,) the appropriator is either ecclesiastical or lay, corporation aggregate or individual, as the case may be, but has never (as appropriator) the cure of souls within the parish; while the vicar, on the other hand, is always an individual and spiritual person, and is charged with the cure of souls. And as to the emoluments in vicarages, they belong in part to the appropriator, in part to the vicar, according to distinctions already in part referred to, but to be discussed more fully hereafter. To these explanations it may be proper to add, that in non-appropriated churches, the rector; in those which are appropriated, the vicar; is seised for his life only, the fee being in abeyance (*z*); but the appropriator may be seised in fee, or of a less estate, according to the circumstances of his title.

But it is not in all appropriations that a vicar exists; for in some it happens, in consequence of their being exempted, (for particular reasons,) from the statute of Hen. IV. c. 12 (*a*),

(*y*) By 2 & 3 Vict. c. 30, reciting that there are several benefices in which more than one spiritual person has the general cure of souls. the bishop is empowered, where such is

the case, to order an apportionment of the spiritual services.

(*z*) Vide sup. vol. i. p. 223.

(*a*) 1 Bl. Com. 394; 1 Burn's Eccl. L. 427; Wats. C. L. 172.

that no vicar has ever been endowed. Such churches however usually possess a permanent minister in holy orders, of the same general description, who, under the denomination of *perpetual curate* (*b*), is charged with the cure of souls, and entitled to emolument for his services; and where there is no perpetual curate properly so called, the appropriator is bound from time to time to provide some person in holy orders to perform the same duty, and to pay him a proper remuneration for his services (*c*).

It is to be observed also, as another anomaly in the law of vicarages, that in former times the rector of a benefice having cure of souls, sometimes obtained permission from superior authority, to appoint a vicar to officiate under him; so that by this means two persons were instituted to the same church, and both had cure of souls; the effect of which was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties. An incumbent so circumstanced is commonly called a *sinecure rector*, or rector without cure of souls (*d*). But by a late statute, 3 & 4 Vict. c. 113, it is now provided that all ecclesiastical rectories without cure of souls in the sole patronage of the crown, or of any ecclesiastical corporation aggregate or sole, and having a vicar endowed or a perpetual curate, shall immediately upon the future vacancies thereof respectively be suppressed; and that with respect to all such as are in the patronage of any other person, the patronage of them may be at any time sold to the Ecclesiastical Commissioners, and upon the completion of such purchase the same shall respectively be suppressed (*e*); and the lands, tithes and endowments thereof shall be vested in the Ecclesiastical Commissioners (*f*),

(*b*) As to perpetual curates, see Doe v. Thomas, 9 A. & E. 556; Hine v. Reynolds, 2 Man. & Gr. 71; 1 Geo. 1, c. 10, s. 4 and 21.

(*c*) See 1 & 2 Vict. c. 31; Hine v. Reynolds, *ubi sup.* and the authorities there cited. Also, Arthington v.

Bishop of Chester, 1 H. Bl. 429.

(*d*) See 2 Burn's Eccl. L. 347; Christian's Blackst. vol. i. p. 386 (n.); Rogers' Eccl. L. 890; Gibs. Cod. 753.

(*e*) Sect. 48.

(*f*) Sect. 54.

and may be afterwards annexed, when it shall appear expedient, to the vicarage or perpetual curacy; which shall be thereupon constituted a rectory with cure of souls (*g*). And moreover, that wherever any rectory theretofore deemed a rectory without cure of souls had been held, together with the vicarage dependant thereon, for the period of twenty years then last past, the same shall not be construed to be a rectory without cure of souls within the meaning of that act, but shall become permanently a rectory with cure of souls. (*h*)

We have thus had occasion incidentally to notice three several kinds of parochial preferments, rectories, vicarages, and perpetual curacies; to which may be added (as we shall see hereafter) district churches and endowed chapelries. And as to all these we may remark, that they are usually comprehended under the general term of *benefice* (*i*); a term indeed which, in its technical sense, extends not only to these, but also to ecclesiastical preferments to which rank or public office is attached, and which are described in our books as ecclesiastical *dignities* or *offices*, such as bishoprics, deaneries, and the like (*j*); but in popular acceptance it is almost invariably appropriated to rectories, vicarages, and the other parochial preferments above enumerated (*k*).

2. [The method of becoming a parson or a vicar is much the same. To both there are] in general [four requisites necessary: *holy orders*, *presentation*, *institution*, and in-

(*g*) Sect. 55.

(*h*) Ibid.

(*i*) *Benefice* is a term derived from the feudal law, vide sup., vol. i. p. 161, where it signified a permanent stipendiary estate.

(*j*) 3 Inst. 155.

(*k*) By a late act, 1 & 2 Vict. c. 106, s. 124, a distinction is expressly made between *benefices* and such preferments as have either rank or public office connected with them, that sta-

tute having adopted the two general terms of *benefices* and *cathedral preferments*; by the former of which it is to be understood to mean all parochial or district churches, and endowed chapels and chapelries; by the latter, all deaneries, archdeaconries, and canonries, and generally all dignities and offices in any cathedral or collegiate church below the rank of a bishop. See also 5 & 6 Vict. c. 27, s. 15; c. 108, s. 31.

[*duction.*] The method of conferring *holy orders* has been already so far noticed as the purpose of these Commentaries required (*l*); we shall therefore only remark here, in reference to this qualification, that though [by the common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage,] it was afterwards ordained by 13 Eliz. c. 12, that no deacon under twenty-three years of age should be so admitted; and that a deacon not ordained priest within one year after his induction, should be *ipso facto* deprived; and now by statute 13 & 14 Car. II. c. 4, s. 14, it is enacted that no person shall be capable of being admitted to any benefice unless he shall have been first ordained *priest*.

[Any clerk may be *presented* (*m*) to a parsonage or vicarage; that is, the patron, to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find a more convenient place to treat] under our third division, relating to the benefices and endowments of the church; and shall for the present only remark, that if the patron neglects to present for the period of six calendar months, the bishop becomes entitled himself, by lapse (as it is called), to put a clerk into the vacant benefice. [But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days (*n*). Or, 2. If the clerk be unfit (*o*): which unfitness is of several kinds. First, with regard to his person; as if he be a bastard (*p*), an outlaw, an excommunicate, an alien, under

(*l*) Vide sup. p. 55.

(*m*) A layman may also be presented; but he must take priest's orders before his admission. 1 Burn's E. L. 103.

(*n*) 2 Roll. Abr. 355.

(*o*) Glanv. 1, 13, c. 20.

(*p*) "Though this be classed in the

"books, among the causes of refusal,
"yet such is the liberality of the pre-
"sent times, that no one need appre-
"hend that his presentment would be
"impeded by the incontinence of his
"parents, or by any demerit but his
"own."—Christian's Blackst. vol. i.
p. 389, (*n*.)

[age, or the like (*q*). Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*: but if the bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games or the like, it is not good cause of refusal (*r*). Or lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal,] at least if he be a layman; for in that case he is presumably unaware of the disability. But if the objection be a temporal one, the bishop is not bound to give notice of his refusal (*s*); and if six calendar months expire before a fitter clerk is offered, may take advantage of the lapse.

[If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature, and the fact admitted, (as, for instance, outlawry,) the judges of the king's courts must determine its validity, or whether it be sufficient cause of refusal; but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as heresy, particularly alleged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide its sufficiency (*t*). If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient (*u*): for the statute 9 Edw. II. st. 1, c. 13, is express, that the examination of the fitness of a person presented to a benefice, belongs to the ecclesiastical

(*q*) 2 Roll. Abr. 356; 2 Inst. 632;
stat. 3 Ric. 2, c. 3; 7 Ric. 2. c. 12.

(*r*) Specot's case, 5 Rep. 58.

(*s*) 2 Inst. 632.

(*t*) Ibid.

(*u*) Specot's case, *ubi sup.*; Hele
v. Bishop of Exeter, 3 Lev. 313.

[judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop returns the clerk to be *minus sufficiens in literatura*, the court shall write to the metropolitan to re-examine him and certify his qualifications; which certificate of the archbishop is final (y).

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be *instituted* by him: which is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk (z).] [But when the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a *collation* to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron; but the church is not full against the crown, till induction: nay, even if a clerk is instituted upon the crown's presentation, the crown may revoke it before induction, and present another clerk (a). Upon institution, also, the clerk may enter on the parsonage-house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their

(y) 2 Inst. 632.

(z) A vicar was formerly bound, upon institution, to take an oath of perpetual residence. 1 Bla. Com. 390.

But this is now abolished. See 1 & 2 Vict. c. 106, s. 61.

(a) Co. Litt. 344.

[new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonnee (*b*).] The title, however, of any person admitted to a rectory or other benefice, will be afterwards divested, unless within two months after actual possession he publicly read in the church of the benefice, upon some Lord's day, and at the appointed times, the morning and evening service according to the Book of Common Prayer; and afterwards publicly, before the congregation, declare his assent to such book (*c*); and also publicly read the Thirty-nine Articles in the same church in the time of common prayer, with declaration of his assent thereto (*d*); and moreover, within three months after his admission, read upon some Lord's day, in the same church, in the presence of the congregation, in the time of divine service, a declaration by him subscribed before the ordinary, of conformity to the Liturgy, together with the certificate of the ordinary of its having been so subscribed (*e*).

In addition to the methods which have been mentioned, of *presentation* and *collation*, it is to be observed, that a clerk may also acquire certain benefices by mere *donation*, that is, by deed of gift alone, without presentation, institution, or induction (*f*). And nearly similar to this, is the manner of becoming a perpetual curate; for this requires no presentation, institution, or induction (*g*). It differs, however, from a pure donative in this, that the perpetual curate cannot legally officiate until he obtains the bishop's

(*b*) Co. Litt. 300.

(*c*) 13 & 14 Car. 2, c. 4, s. 6.

(*d*) 13 Eliz. c. 12, s. 3.

(*e*) 13 & 14 Car. 2, c. 4, s. 8—12;
1 W. & M. sess. 1, c. 8, s. 11.

(*f*) Co. Litt. 344. As to donatives, see *Repington v. Governor of*

Tamworth School, 2 Wils. 150; 2 Bla. Com. 23, note by Christian; *Rennell v. Bishop of Lincoln*, 7 B. & C. 113; S. C. in error, 8 Bing. 490; *Wats. C. L.* 170.

(*g*) *Wats. C. L.* 172.

licence (*g*). As to these perpetual curacies, their origin has been already explained. With respect to *donatives*, they are created whenever [the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk, by the patron's deed of donation, without presentation, institution, or induction (*h*). This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop, not being established more early than the time of Archbishop Becket, in the reign of Henry II. (*i*) And therefore though Pope Alexander III. (*k*), in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island; and in proof of it they allege a letter from the English nobility to the Pope in the reign of Henry III., recorded by Matthew Paris (*l*), which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the Pope and his bishops endeavoured to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and

(*g*) R. v. Bishop of Chester, 1 T. R. 403; Wals. C. L. 172.

(*h*) Co. Litt. 344.

(*i*) Seld. Tith. c. 12, s. 2.

(*k*) Decretal. l. 3, t. 7, c. 3.

(*l*) A. D. 1239.

[presents to the bishop, and his clerk is admitted and instituted, the advowson is now become for ever presentative, and shall never be donative any more (*m*). For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and construed as strictly as possible. If therefore the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever: and will therefore reduce it to the standard of other ecclesiastical livings.]

[3. The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under] our third division, as to church benefices and endowments: [and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark, as they arise in the progress of our inquiries, but for the rest it will be sufficient to refer to such authors as have compiled treatises expressly upon this subject (*n*). We shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an *incumbent*.]

By statute 1 & 2 Vict. c. 106, (repealing the former acts (*o*) on the subject,) every spiritual person holding a benefice (*p*), (a term which, as used in this act, comprises all parochial churches, perpetual curacies, chapels, and church or chapel districts whatever, if with cure of souls (*q*),)

(*m*) Co. Litt. 344; *Farchild v. Gayre*, Cro. Jac. 63.

(*n*) These are very numerous: but there are few which can be relied on with certainty. Among these are Bishop Gibson's Codex, Dr. Burn's Ecclesiastical Law, and the earlier editions of the Clergyman's Law, pub-

lished under the name of Dr. Watson, but compiled by Mr. Place, a barrister.

(*o*) 21 Hen. 8, c. 13; 57 Geo. 3, c. 99.

(*p*) Vide s. 124.

(*q*) Ibid. As to the meaning of this word in general, vide sup. p. 77.

shall keep residence on his benefice, and in the house of residence belonging thereto; and if he absents himself therefrom for a period exceeding three months, either accounted together or at several times, in any one year, he shall forfeit, unless resident at some other of his benefices, a certain portion (increasing with the length of absence) of the annual value of his benefice (*r*). But this is subject to various exceptions and modifications, of which the principal are as follows: 1st, No heads of houses in the university of Cambridge or Oxford, or warden of the university of Durham, or head master of Eton, Winchester, or Westminster school, who shall have respectively not more than one benefice, shall be liable to the penalties of non-residence (*s*). 2dly, Deans and archdeacons, and various public professors, readers, preachers and chaplains, the provost of Eton, the warden of Winchester, the master of the Charterhouse, the principal of St. David's, and of King's College, London, and also (provided they are not absent from their benefices more than five months in the year) the fellows of Eton and Winchester, and all canons, minor canons, priest vicars, and vicars choral, are entitled to count the time of their official residences or duties, as if it had been passed upon their benefices (*t*). 3dly, If there be no house, or no fit house of residence, the bishop may licence the holder of the benefice from time to time to reside in some fit house elsewhere, provided it be within a certain specified distance from his church or chapel, and the same shall thereupon become a legal house of residence for all purposes. 4thly, If there be no house, or no fit house of residence, and such certificate be also produced as by the act provided, that no house convenient for the residence of the holder of the benefice can be obtained within the parish, or within the specified distance from the church or chapel, or if the residence of the holder of any

(*r*) Sect. 34.

(*s*) Sect. 37. This is also extended to a principal or professor of the East

India College, if appointed before the act passed.

(*t*) Sect. 38, 39.

benefice within those limits is prevented by any incapacity of mind or body, or by the dangerous illness of his wife or child, (but subject in the latter case to certain restrictions as to time and otherwise), the bishop may grant a licence of non-residence; or in case of his refusal, there may be an appeal to the archbishop of the province (*u*). 5thly, If the holder of any benefice happen to occupy in the same parish, any mansion or messuage whereof he is the owner, the bishop may grant him a licence to reside therein; and if he refuses, remedy may be had by the same course of appeal. 6thly, The bishop is empowered, in any other case besides those enumerated, to grant, if he shall think it expedient, a licence to reside out of the limits of the benefice; but in a case of this description the special circumstances and reasons must be transmitted to the archbishop of the province, without whose allowance the licence will be ineffectual (*x*).

It is farther provided by this act, that annual returns of residents and non-residents shall be made to her majesty in council (*y*); and that in case of non-residence the bishop, instead of proceeding to enforce the penalties, may issue a monition against the offender, to be followed up, where requisite, by an order to reside; and in case of non-compliance with such order, may sequester the profits of the benefice, and apply them to the purposes in the act specified (*z*). In case also of long continued or repeated sequestration the benefice is to become void, and a new presentation may be made as if the former holder were dead (*a*).

For the more effectual promotion of this important duty of residence among the parochial clergy, there are also contained in this act (as in several others) a variety of provisions for repairing the houses in which they are to reside, and for building or purchasing new ones, and for

(*u*) Sect. 43.(*z*) Sect. 54.(*x*) Sect. 44.(*a*) Sect. 58.(*y*) Sect. 51, 53.

raising money for these purposes by mortgage of the benefices (*b*).

4. [We have seen that there is but one way whereby one may become a parson or vicar,] (viz. by the gift of a patron, followed in general by the admission of the ordinary;) but [there are many ways by which one may cease to be so. 1. By death. 2. By cession, or taking another benefice.] For by statute 1 & 2 Vict. c. 106 (*c*), (repealing the former statute against pluralities (*d*),) it is enacted, that in future, (and subject to exception in the case of rights already vested (*e*),) no spiritual person holding any benefice with cure of souls (*f*) shall take to hold therewith any other benefice with cure of souls, unless situated within ten statute miles of the first (*g*); that no spiritual person holding a benefice with cure of souls, with a population of more than 3000, shall take to hold therewith any other, having a population of more than 500, nor *vice versâ*; that no spiritual person shall hold together any two benefices with cure of souls of the joint value of more than 1000*l.* *per annum*: that no spiritual person holding more than one benefice with cure of souls shall take to hold therewith any other, or any cathedral preferment (*h*); and that upon every admission to a new benefice or preferment contrary to the act, every benefice previously held shall be void *ipso facto* (*i*): which prohibition, however, in

(*b*) The following enumeration is believed to comprise the whole of these statutes. See 17 Geo. 3, c. 53; 21 Geo. 3, c. 66; 43 Geo. 3, cc. 107, 108; 51 Geo. 3, c. 115; 55 Geo. 3, c. 147; 56 Geo. 3, c. 152; 5 Geo. 4, c. 89; 7 Geo. 4, c. 66; 1 & 2 Vict. cc. 23, 29, 106, ss. 25, 62, &c.; 3 & 4 Vict. c. 113, s. 59; 4 & 5 Vict. c. 39, s. 18; 5 & 6 Vict. c. 26 (repealing 2 & 3 Vict. c. 18).

(*c*) As to the law of cession before this act, see *Alston v. Atlay*, 7 A. & E. 289.

(*d*) 21 Hen. 8, c. 13.

(*e*) Sect. 12, 13.

(*f*) See s. 124.

(*g*) Sect. 3, 129.

(*h*) Sect. 2.

(*i*) Sect. 11. The act also provides, as to cathedral preferments, that no spiritual person holding any such preferment, and also a benefice, shall hold therewith any other cathedral preferment or any other benefice; and that no spiritual person holding any preferment in any cathedral or collegiate church shall hold therewith any preferment in any other cathedral or collegiate church, but with certain exceptions in favour of archdeacons; vide s. 2, and 4 & 5 Vict. c. 39, s. 10.

respect of population and yearly value, are subject to a provision enabling the Archbishop of Canterbury to grant a dispensation therefrom in certain cases, on recommendation of the bishop of the diocese (*k*). [3. By consecration; for, as was mentioned before, when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated (*l*). But there is a method, by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two or three years, or perpetual; being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere*,] and has been usually granted to bishops in the poorer sees, to aid the deficiency of their episcopal revenue. And [there is also a *commenda recipere*, which is to take a benefice *de novo* in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk (*m*).] But now, by 6 & 7 Will. IV. c. 77, s. 18 (*n*), no ecclesiastical dignity, office or benefice shall be held *in commendam* by any bishop, unless he shall have held the same when the act passed; and every *commendam* thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void to all purposes. [4. By resignation; but this is of no avail till accepted by the ordinary, into whose hands the resignation must be made (*o*). 5. By deprivation; either, first, by sentence declaratory in the] proper court (*p*), [for fit and sufficient causes; such as attainder of treason or felony (*q*), or conviction of other infamous crime in the king's courts; for

(*k*) Sects. 5, 6.

(*l*) Vide sup. p. 66.

(*m*) *Colt v. Bishop of Lichfield and Coventry*, Hob. 144.

(*n*) See also as to Sodor and Man, 1 & 2 Vict. c. 30.

(*o*) *Fane's case*, Cro. Jac. 198.

(*p*) See the "Act for better enforcing Church Discipline," 3 & 4 Vict. c. 86; *Re Dean of York*, 2 Ad. & El. N. S. 1.

(*q*) *Bishop of Chichester v. Webb*, Dyer, 108; *Jenk.* 210.

[heresy, infidelity (*r*), gross immorality, and the like ;] or for farming or trading contrary to law, after two former convictions for the same offence (*s*) : [or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malefeasance or crime ; as, for simony (*t*) ; for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common-prayer (*u*) ; for neglecting to read the liturgy and articles in the church,] and declare assent to the same, within two months after induction (*x*) ; or [for using any other form of prayer than the liturgy of the Church of England (*y*) ; in all which and similar cases (*z*) the benefice is *ipso facto* void, without any formal sentence of deprivation.

VI. A curate is the lowest degree in the church :] being an officiating temporary minister regularly employed by the spiritual rector or vicar, either to serve in his absence, or as his assistant, as the case may be (*a*). All curates ought, before they enter on their duties, to be *licensed* (*b*) by the bishop of the diocese ; and the law, on the other hand, has made several provisions for their proper maintenance. For by 28 Hen. VIII. c. 11 (*c*), [such as serve a church during its vacancy shall be paid such stipend as the ordinary thinks reasonable, out of the profits of the vacancy ; or, if that be not sufficient, by the successor, within fourteen days after he takes possession.] And by a modern act of parliament, 1 & 2 Vict. c. 106, (which we have already had occasion to notice under the

(*r*) Fitz. Abr. tit. Trial, 54.

(*s*) 1 & 2 Vict. c. 106, s. 31.

(*t*) Stat. 31 Eliz. c. 6 ; 12 Ann. st. c. 12.

(*u*) Stat. 1 Eliz. cc. 1, 2 ; 13 Eliz. c. 12.

(*x*) Ibid. s. 3 ; 13 & 14 Car. 2, c. 4, s. 6.

(*y*) Stat. 1 Eliz. c. 2.

(*z*) Green's case, 6 Rep. 29, 30 ; vide 13 & 14 Car. 2, c. 4, s. 6 ; et

vide sup. p. 81.

(*a*) Burn's Ecc. Law, by Tyrw. vol. ii. p. 54 (a). As to the common law right of the rector to appoint his curate, see *Arnold v. Bishop of Bath*, 5 Bing. 316. As to *lecturers* and *preachers*, see 7 & 8 Vict. c. 59.

(*b*) Ibid. 61 ; Wats. C. L. 147, 207, 335.

(*c*) Sects. 5, 10.

heads of *residence* and *pluralities*,) numerous provisions are made as to the *appointment and payment of curates* during an incumbency; and, among others, that in certain cases of non-residence by the incumbent, the bishop may, in his default, appoint a proper curate with a stipend (*d*); and shall also, in some instances, where the incumbent fails to reside, require the curate to reside (*e*); that where the bishop sees reason to believe that the duties of any benefice are inadequately performed, or where the benefice is of a certain value or extent, he may (though in the first case only after referring the matter to certain commissioners) require the incumbent, whether actually resident or not, to nominate a proper curate with sufficient stipend, and on his default may himself make such appointment (*f*); that the stipend to be allowed to the curate, in every case where he is appointed by the bishop under the provisions of the act, shall bear a specific proportion to the value and population of the benefice (*g*); and that in all cases of dispute between the incumbent and the curate touching stipend, or the non-payment of stipend, the bishop, on complaint to him made, may summarily determine the same without appeal, and enforce his sentence by monition and sequestration (*h*).

[Thus much of the clergy, properly so called. There are also certain inferior officers] connected with the church, [of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction where it is deficient in powers. On which officers we shall make a few cursory remarks.

VII. Churchwardens (*i*) are the guardians or keepers

(*d*) Sect. 85. The former statutes on the subject of curates' stipends during the incumbency, are all repealed. See 57 Geo. 3, c. 99, which act is itself repealed by 1 & 2 Vict. c. 106, except so far as regards the repeal of the former statutes.

(*e*) Sect. 76.

(*f*) Sects. 77, 78.

(*g*) Sect. 85.

(*h*) Sect. 83.

(*i*) Bac. Abr. Churchwardens; Burn's Ecc. Law, *eodem tit.*; Ex parte Winfield, 3 Ad. & El. 614; R. v. Archdeacon of Middlesex, *ibid.* 615; Ex parte Duffield, *ibid.* 617; R. v. Marsh, 5 Ad. & El. 468.

[of the church, and representatives of the body of the parish (*k*);] but, though in some sort ecclesiastical officers, they are always lay persons (*l*). [They are sometimes appointed by the minister, sometimes by the parish,] in vestry assembled (*m*), [sometimes by both together, as custom directs (*n*).] But where there is no custom, it is said the election must be according to the canons (*o*), which direct (*p*) that they shall be chosen by the joint consent of the minister and parishioners, if it may be; but if they cannot agree, then the minister is to choose one, and the parishioners another. They are to be chosen yearly in Easter week, and are generally two in number, are obliged when chosen to serve (*q*), and are sworn to execute their office faithfully (*r*). [They are taken, in favour of the church, to be for some purposes a kind of corporation, at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish (*s*);] and one of their chief duties accordingly is the care and management of the goods belonging to the church, such as the organ, bells, bible and parish books (*t*). But

(*k*) In Sweden they have similar officers, whom they call *kiorckio-wariandes*. Stiernhook, l. 3, c. 7.

(*l*) Per Hale, Hard. 379; 1 Rol. Ab. 653; 2 Rol. Rep. 107.

(*m*) As to vestries, vide sup. vol. i. p. 112.

(*n*) As to the manner of their election, see *Campbell v. Maund*, 5 Ad. & El. 865; *R. v. Rector of Lambeth*, 8 Ad. & El. 356. The manner of electing them in churches newly built under the Church Building Acts is fixed by 58 Geo. 3, c. 45, s. 73.

(*o*) *Catten v. Barwick*, Str. 145. See Bac. Ab. Churchwardens, A., and the authorities there cited in the margin.

(*p*) Canon 89.

(*q*) Several persons, however, are exempted from the office, viz. peers of

the realm, members of parliament, clergymen, Roman Catholic clergy, dissenting ministers, barristers, attorneys, clerks in court, physicians, surgeons, apothecaries, aldermen, dissenting teachers, and persons living out of the parish, unless they occupy a house of trade there; Steer, P. L. 84.

(*r*) Ibid. 88. As to granting a mandamus to swear them in, *Ex parte Winfield*, 3 Ad. & El. 614, 615.

(*s*) Vide 9 Geo. 1, c. 7, s. 4; et vide as to parish lands, 59 Geo. 3, c. 12, s. 17; 5 & 6 Will. 4, c. 69, s. 4; *Smith v. Adkins*, 8 Mee. & W. 362.

(*t*) Bac. Ab. Churchwarden, B.; Wats. C. L. 390; *Addison v. Round*, 4 Ad. & El. 799; *Jackson v. Adams*, 2 Bing. N. C. 402.

as to the church and churchyard [they have no sort of interest therein; and if any damage be done thereto, the parson only or vicar shall have the action (*u*).] It is also part of their office, unless other persons are appointed by the ordinary for that purpose, to have the care of the benefice during its vacancy, or while it is under sequestration for the debts of the incumbent (*x*). They are moreover required to see to the reparation of the church, and the making of the *church rates*, by which the expenses of it are to be defrayed; which rates are to be made by the parishioners at large; that is, by the majority of those that are present at a vestry to be summoned for that purpose by the churchwardens (*y*); and when made, are recoverable in the ecclesiastical court, or (if the arrears do not exceed 10*l.*, and no question be raised as to the legal liability) before two justices of the peace (*z*). Churchwardens are also to make such order relative to seats in the church and chancel, not appropriated to particular persons, as the ordinary (who has in general the sole power in this matter) (*a*) shall direct, and, in practice, the arrangements are usually made by the churchwardens, even without any special direction from the ordinary (*b*). It is incident also to their office to enforce proper and orderly behaviour during divine service, [to which end it has been held that churchwardens may justify the pulling off a man's hat] irreverently worn there (*c*); and besides these, there are a multitude of other parochial powers committed to their charge (*d*), which

(*u*) 1 Bl. Com. 395. Churchwardens cannot set up monuments, Beckwith v. Harding, 1 B. & Ald. 508.

(*x*) Steer, P. L. 91.

(*y*) Burder v. Veley, 12 Ad. & El. 247. As to church rate, see also Craven v. Sanderson, 7 Ad. & El. 880; R. v. St. Margaret's, 2 Per. & D. 510.

(*z*) 53 Geo. 3, c. 127; 5 & 6 Will. 4, c. 74; 4 & 5 Vict. c. 36; Richards

v. Dyke, 2 Gale & D. 493; R. v. St. Clement's, 12 Ad. & El. 177.

(*a*) 3 Inst. 202; Clifford v. Wicks, 1 B. & Ald. 506; contra as to chancel, Wats. C. L. 388.

(*b*) Rogers's Ec. L. 179.

(*c*) Hawe v. Planner, 1 Saund. 10; S. C. 1 Sid. 301; and see Burton v. Henson, 10 Mee. & W. 105.

(*d*) Among these are some which the changes in public opinion have

cannot be particularized without descending to inconvenient minuteness. Formerly too they were joined with the overseers in the care and maintenance of the poor; but this duty is now in general taken from them by the effect of the act for amendment of the poor law (*e*), and of the regulations introduced, under its authority, by the poor law commissioners.

Such then in general are the duties of churchwardens; to which we shall only add, that, in case of their wasting the goods of the church, or being guilty of other misbehaviour, they are liable to removal (*f*); and that at the end of their year, they are bound to render an account of all their receipts and disbursements (*g*).

VIII. Parish clerks and sextons (*h*) are also persons connected with the church, and by the common law have freeholds in their office, though the former may, by 7 & 8 Vict. c. 59, be suspended or removed by the archdeacon for misconduct or neglect (*i*). The duties of the parish clerk are too familiarly known to require description. In some few instances he is in holy orders (*h*), but his general qualification is only that he shall be at least twenty years of age, known to the parson, vicar, or minister, to be of

thrown into desuetude, such as levying one shilling forfeiture on all such as do not repair to church on Sundays and holidays. Vide post, p. 102.

(*e*) 4 & 5 Will. 4, c. 76.

(*f*) Steer, P. L. 95.

(*g*) Ibid. 92; *Leman v. Goulty*, 3 T. R. 3; *Astle v. Thomas*, 2 B. & C. 271. It is said that in London the case of churchwardens is in some respects peculiar, that they are generally chosen there by the parishioners independently of the parson; are a corporation for all purposes; have the disposal of the seats in the church, independently of the bishop; and in

most of the churches repair not only the church, but the chancel. Pulling's Law of London, p. 263. The legality as to such a custom as above-mentioned with regard to seats has however been questioned. See Rogers's Ec. L. p. 185.

(*h*) Burn's Ec. L. by Tyrw.; Steer, P. L. 96.

(*i*) 2 Roll. Abr. 234. As to the former law on this subject, see *R. v. Davies*, 9 D. & R. 234; *R. v. Neale*, 4 Nev. & M. 868.

(*k*) See as to parish clerks in orders, 7 & 8 Vict. c. 59.

honest conversation, and sufficient for his office (*l*). [He is generally appointed by the incumbent (*m*); but by custom may be chosen by the inhabitants (*n*);] his appointment may be by word of mouth only (*o*); and his remuneration depends altogether upon the custom of the particular parish (*p*). The *sexton* (*q*) is, in the ordinary course, chosen by the rector; though sometimes by the parishioners, where a usage to that effect prevails (*r*). His salary depends on custom, and is paid by the churchwardens; his duty is to cleanse the church, to open the pews, to fill up the graves for the dead, to provide candles and other necessities, and to prevent disturbance in the church (*s*). In the new churches built under the Church Building Acts, it is provided both as to clerk and sexton (59 Geo. III. c. 134, s. 6, 10), that when any parish shall be divided, all fees and emoluments belonging to the parish clerk or sexton respectively, shall belong also, and be recoverable in like manner, as regards any new district, by the clerk or sexton appointed to such district, and compensation in that behalf shall be made to the parish clerk or sexton.

(*l*) Canon 91.

(*m*) Canon 91. In churches built under the Church Building Acts, he is to be annually appointed by the minister. See 58 Geo. 3, c. 45; 59 Geo. 3, c. 134.

(*n*) 13 Rep. 70; Jermyn's case, Cro. Jac. 670; Peake v. Bourne, Str. 942. As to the appointment of a clerk after an union of parishes, Hartley v. Cook, 9 Bing. 728.

(*o*) R. v. Inhabitants of Bobbing, 5 A. & E. 682.

(*p*) Steer, P. L. 97. The parish clerks in and about London are incorporated, *ibid.* 99; Pulling's Law of London, p. 264.

(*q*) Apparently from *sacristan*, the

keeper of things belonging to divine worship.

(*r*) R. v. Minister of Stoke Damerel, 5 A. & E. 587; R. v. Inhabitants of Bobbing, *ibid.* 682; Roger's Ec. L. 834.

(*s*) Vide R. v. Inhabitants of Liverpool, 3 T. R. 119; Shaw's P. L. 71. Besides the parish clerk and sexton, there is generally attached to the church, a *beadle*, (from the Saxon *beodun*, to bid,) who is chosen by the vestry, and whose business is to attend the vestry, to give notice of its meetings to the parishioners, and execute its orders, and to assist the constable in apprehending vagrants, &c.; Shaw's P. L. c. 19.

CHAPTER II.

OF THE DOCTRINES AND WORSHIP OF THE CHURCH,
AND HEREIN OF THE LAWS AS TO HERESY AND
NON-CONFORMITY.

THOUGH this nation has constantly adhered to the principle of an established church, that is, a church endowed, and (as occasion has required) protected, by the provision of the temporal law (*a*); yet no claim was formerly made by the temporal law, to interfere with the regulation of its faith, ceremonies, or discipline. These being matters *merè spiritualia* (*b*), fell under the exclusive province of the ecclesiastical authorities (*c*); who, in their exercise of it, were guided by the law of the popes and councils, modified from time to time, by our own legatine and provincial constitutions (*d*). But at the era of the Reformation it was found necessary to resort to the legislature, for an authoritative exposition of the true Protestant faith, the establishment of appropriate forms of worship, and the declaration of the crown's supremacy, in lieu of that of the pope, in matters ecclesiastical; and from this time the power of the ordinary ecclesiastical authorities of the realm has been exercised in subordination to these paramount institutions of the civil government.

And first, the *Articles of Faith*, consisting originally of forty-two, but afterwards reduced to thirty-nine (and com-

(*a*) *Ecclesia Anglicana per inclitissimos progenitores et antecessores domini regis, laudabiliter dotata, et in suis juribus et libertatibus sustentata.* Stat. 2 Hen. 4, c. 15.

(*b*) *St. Circumspectè agatis*, 13 Ed.

1, st. 4, c. 1.

(*c*) *Sanctæ determinationes ecclesiæ sacrosanctæ*, 2 Hen. 4, c. 15; *les loies de seinte esglise*, 2 Hen. 5, st. 1, c. 7.

(*d*) *Vide supra*, vol. i. p. 63.

monly called the *Thirty-nine Articles*), were framed by Archbishop Cranmer, with the assistance of other persons of distinguished learning and piety, in the reign of Edward VI. (e); and were reduced to their present form in the convocation of the archbishops and bishops of both provinces, held at London in the reign of Queen Elizabeth, A. D. 1562 (f). And by statute 13 Eliz. c. 12, it was provided that if any person ecclesiastical, or having ecclesiastical living, shall advisedly maintain any doctrine directly repugnant to any of the said articles, and on being convened before the bishop, still persist therein, he shall be liable to be deprived (g).

The *Form of Prayer and Church Service*, commonly called the *Liturgy*, was also first framed in the reign of Edward VI., under the superintendence of Cranmer and his coadjutors (i). Before the Reformation various liturgies had been in use in different parts of the realm (k). But a new ritual (chiefly founded, however, on the antient services), with *rubrics* prescribing the order and form to be pursued, was now compiled for the uniform observance of the whole reformed church of England. This book of King Edward VI. was, for the most part, the same with our present Book of Common Prayer. It was established by statute 2 & 3 Edw. VI. c. 1; and being after-

(e) Hallam's Const. Hist. vol. i. p. 134. The first draft of the Articles was made by Cranmer, assisted by Bishop Ridley, in 1551; and after being corrected by the other bishops, Latimer, Hooper, Poyntet, Coverdale, &c., and approved by convocation, were published in 1553. In 1562, 1571, and 1662, they were successively revised and confirmed. Adams, Relig. World, vol. i. p. 399.

(f) See 13 Eliz. c. 12, s. 1.

(g) Ibid. sect. 2.

(i) Hallam, ub. sup. p. 117; stat. 2 & 3 Edw. 6, c. 1, s. 1.

(k) The statute 2 & 3 Edw. 6, c. 1, recites, that "of long time there hath

" been had in this realm of England
" divers forms of common prayer com-
" monly called the Service of the
" Church, that is to say, the use of
" Sarum, of York, of Bangor, and of
" Lincoln; and besides the same, now
" of late much more divers and sundry
" forms and fashions have been used
" in the cathedral and parish churches
" of England, Wales, &c." Almost
the whole of our Liturgy was taken
from the forms here described; parti-
cularly from that of Sarum; and most
of it can be traced to periods before
the Conquest. See Palmer's *Ori-
gines Liturgicæ*.

wards revised, was confirmed by 5 & 6 Edw. VI. c. 1, and 1 Eliz. c. 2; and after two other successive revisions in the reigns of Kings James I. (*m*) and Charles II., was again confirmed by 13 & 14 Car. II. c. 4; all which statutes are intituled Acts of Uniformity, or more particularly, Acts for the Uniformity of Service in the Church and Administration of the Sacraments. In the reign of King James I. a new version also of the Holy Scriptures was made, and established by law; being the same which is still in use under the denomination of King James's Bible (*n*).

As to the *crown's supremacy*, it was definitively established by 1 Eliz. c. 1 (*o*); a statute which, first, provides that no foreign prince or potentate, spiritual or temporal, shall exercise any manner of jurisdiction or privilege, spiritual or ecclesiastical, within this realm or the dominions thereof (*p*); and, next, that such jurisdictions and privileges as had before been exercised by any spiritual or ecclesiastical power for visitation and correction of the church, shall for ever, by authority of the present parliament, be united and annexed to the imperial crown of this realm (*q*).

The new regulations thus introduced by the législature, taken in connection with other legislative enactments of the same era, but of subordinate importance, and in connection also with the national canon law, (which still gives the rule where these are silent,) have constituted from the period of which we speak, and still constitute, the standard of faith, worship, and discipline in the Church of England. It remains, however, to consider on what persons and in what cases this standard is to be deemed imperative—whether it is binding merely on those who claim the benefits of the church establishment, or generally on all the subjects

(*m*) Wats. C. L. p. 321.

(*n*) The canonical authority of the different books of Scripture is settled by the Thirty-nine Articles.

(*o*) The supremacy had been before declared by 26 Hen. 8, c. 1, and indeed prior to the Reformation, by the

statute of Præmunire, 16 Ric. 2, c. 5.

As to the supremacy, see also 5 Eliz. c. 1, s. 1, 2, 3, 4, 10; Intro. to 4 Rep.; 4 Inst. 42, 331, 341; Hallam's Const. Hist. vol. i. p. 162.

(*p*) Sect. 16.

(*q*) Sect. 17.

of the realm, whatever may be in fact the state of their religious opinions. And here we shall find that the law has passed through changes of a very remarkable description. Though the statute of Elizabeth just cited effected an emancipation from the Roman yoke, and may therefore be justly considered as having laid the foundation of spiritual freedom, it was not till long afterwards that the nation learned the lesson of religious toleration; and our law in the meantime proceeded not only to imitate the persecutions of the Popish times, but in some respects to surpass them; for while it continued to punish (as it had long done in aid of the ecclesiastical authorities) the offence of *heresy*, it began now to exercise new rigours of its own with respect to that of *nonconformity*. In the remainder of this chapter we propose to enter into some detail of each of the subjects just enumerated, and to show both the former state of the law respecting them, and the alterations which it has latterly sustained.

1. *Heresy* was described among the canonists, in vague and general terms, as consisting of any deviation from the true Catholic faith, as understood by Holy Mother Church (*r*).—[very contrary to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness,] and spoke of heretics by name, as in the case of the Manichees, Nestorians, and others (*s*). The cognizance of this offence has always been held in this and every other country, where the canon law has prevailed, to belong to the ecclesiastical judge (*t*); and the papal canonists have ever treated it with great severity. It is true that they [went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation for heresy, though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation

(*r*) *Hæreticus, qui de articulis fidei aliter prædicat, sentit, vel doceat, quàm docet sancta mater ecclesia*, vide 1 Hale, P. C. 383.

(*s*) Vide 1 Hale, P. C. 383.

(*t*) Year Book, 27 Hen. 8, 14 b; stat. 2 Hen. 4, c. 15; 1 Hale, P. C. 384; 4 Bl. Com. 45.

[of goods *in pios usus*.] They also in course of time [prevailed upon the weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal but even a capital offence, the Romish ecclesiastics determining, without appeal, whatever they pleased, to be heresy, and shifting off to the secular arm the odium and drudgery of executions, with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray on behalf of the convicted heretic, *ut citra mortis periculum sententia, circum moderetur* (*u*), well knowing at the same time, that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichees, by the Emperors Theodosius and Justinian (*v*); hence also the constitution of the Emperor Frederic, mentioned by Lyndewode (*w*), adjudging all persons, without distinction, to be burned by fire who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution (*x*), ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good Catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was somewhat singular, and may serve to illustrate at once the gratitude of the holy see and the just punishment of the royal bigot,—for upon the authority of this very constitution the pope afterwards expelled this very Emperor Frederic from his kingdom of Sicily and gave it to Charles of Anjou (*y*).

Christianity being thus deformed by the demon of perse-

(*u*) Decretal. lib. 5, t. 40, c. 27.

(*x*) Cod. 1, 5, 4.

(*v*) Cod. l. i. tit. 5.

(*y*) Baldus in Cod. 1, 5, 4.

(*w*) C. de Hæreticis.

[cution upon the continent, we cannot expect that our own island should be entirely free from the same scourge;] and accordingly we find not only that our ecclesiastical courts were always in the habit of proceeding against heretics by spiritual punishments, such as excommunication and the like, but we discover [among our antient precedents a writ *de hæretico comburendo*, which is thought by some to be as antient as the common law itself (z).] However, it appears that it was not the practice of the common law of England to issue this writ except upon a conviction for contumacy or relapse, nor unless such conviction took place before the archbishop himself in a provincial synod or convocation; and that even that authority could not lawfully award the writ, but merely left the delinquent to the secular power; so that the crown might pardon him, if it thought proper, by forbearing to issue the writ, which was not grantable as of course, but issued by the special direction of the sovereign (a). [But in the reign of Henry IV. when the eyes of the Christian world began to open, and the seeds of the Protestant religion (though under the opprobrious name of Lollardy (b)) took root in this kingdom, the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament (c) which sharpened

(z) 1 Hale, P. C. 392; 1 Hawk. b. 1, c. 2, s. 10; vide St. Tr. vol. ii. 275. But at common law heresy was not punishable by forfeiture of lands or goods. 1 Hale, P. C. 388 (n.)

(a) 1 Hale, P. C. 385, 393, 395. According to some opinions, the writ *de hæretico comburendo* was at common law, not only in practice confined to convictions before the archbishop in provincial synod, but could not legally be awarded on a conviction before any court of inferior authority, such as that of the diocesan. Vide 1 Hale, P. C. 391; 12 Rep. 56, 57.

(b) So called not from *lolium* or tares, (an etymology which was afterwards devised in order to justify the burning of them, Matth. xiii. 30,) but from one Walter Lollard, a German reformer, A. D. 1315. Mod. Un. Hist. xxvi. 13; Spelm. Gloss. 371.

(c) 2 Hen. 4, c. 15. A previous act, 5 Ric. 2, st. 2, c. 5, had been aimed at the followers of Wickliffe, but the commons would not assent to it, and it was revoked the next year. Vide Reeves's Hist. Engl. L. vol. iii. p. 163.

[the edge of persecution to its utmost keenness; for by that statute the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if, after abjuration, he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the stat. 2 Hen. V. c. 7, Lollardism was also made a temporal offence, and indictable in the king's courts, which did not however thereby gain an exclusive but only a concurrent jurisdiction with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated,—for though what heresy *is* was not then precisely defined, yet we are told in some points what it is *not*,—the statute 25 Hen. VIII. c. 14, declaring that offences against the see of Rome are not heresy, and the ordinary being thereby restrained from proceeding in any case upon mere suspicion, that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel; for in six years afterwards, by statute 31 Hen. VIII. c. 14, the bloody law of the Six Articles was made, which established the six most contested points of popery—transubstantiation—communion in one kind—the celibacy of the clergy—monastic vows—the sacrifice of the mass—and auricular confession; which points were “determined and resolved by the most
“godly study, pain and travail of his majesty; for which
“his most humble and obedient subjects the lords spiritual
“and temporal and the commons in parliament assembled
“did not only render and give unto his highness their most
“high and hearty thanks,” but did also enact and declare all oppugners of the first to be heretics, and to be burned with fire,—and of the five last to be felons, and to suffer death. The same statute established a new and mixed

[jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the Christian religion.

We shall not enter into the various repeals and revivals of these sanguinary laws in the two succeeding reigns, but shall proceed directly to the reign of Queen Elizabeth, when the reformation was established] on a firm and permanent basis. [By stat. 1 Eliz. c. 1, all former statutes relating to heresy are repealed, which left the jurisdiction of heresy as it stood at common law,] that is, left the simple offence to be visited by spiritual punishments in the ecclesiastical courts; and the offence, when aggravated by contumacy or relapse, to be dealt with by the writ *de hæretico comburendo*, after a conviction in the provincial synod. [But the principal point now gained was, that, by this statute, a boundary is for the first time set to what shall be accounted heresy; nothing for the future being so determined, but only such tenets which have been heretofore so declared: 1. By the words of the Canonical Scriptures; 2. By the first four general councils, or such others as have only used the words of the Holy Scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation.

The writ, however, *de hæretico comburendo* still remained in force; and we have instances of its being put in execution upon two Anabaptists in the 17th of Eliz., and two Arians in the 9th of Jas. I. But it was totally abolished, and heresy at length subjected only to ecclesiastical correction *pro salute animæ*, by virtue of the statute 29 Car. II. c. 9. For in one and the same reign,] by the joint effect of this and other acts before referred to (*d*), [our lands were delivered from the slavery of military tenures, our

(*d*) The act for abolishing military Habeas Corpus Act, 31 Car. 2, c. 2.
tenure, 12 Car. 2, c. 24, and the Vide sup. vol. i. pp. 136, 198.

[bodies from arbitrary imprisonment, and our minds from the tyranny of superstitious bigotry.] And such still continues to be the state of the law with respect to heresy; the only subsequent provision that is still in force in connection with this subject, being one that is directed rather to the preservation of good order and decency in civil society, than to the maintenance of orthodoxy. We refer to 9 & 10 Will. III. c. 32, by which it is enacted, that if any person, having been educated in or made profession of Christianity, shall, by writing, printing, teaching, or advised speaking, maintain that there are more Gods than one, or deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, and be thereof convicted by two witnesses, he shall, unless he recants, incur such civil disabilities as mentioned in the act, and, on a second conviction, shall also suffer imprisonment for the term of three years (*e*).

2. *Non-conformity*, or dissent from the worship and ceremonies of the Established Church. This by the second of the Acts of Uniformity, 5 & 6 Edw. VI. c. 1, is made a penal offence; it being thereby enacted (*f*), that if any manner of person shall willingly be present at any other manner or form of Common Prayer, of administration of the sacraments, of ordination, or any other rites contained in the Book of Common Prayer, than is in such book set forth, he shall suffer imprisonment, and for the third offence imprisonment for life. And by 1 Eliz. c. 2 (*g*), it is provided, that every inhabitant of the realm or dominion shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let, to some usual place where common prayer shall be used on Sundays and holydays, upon penalty of for-

(*e*) This act also contained similar enactments with regard to denying the Holy Trinity, but as to this, is repealed by 53 Geo. 3, c. 160. See

Rex v. Waddington, 1 Barn. & Cres. 26.

(*f*) Sect. 6.

(*g*) Sect. 14.

feiting for every non-attendance twelve pence, to be levied by the churchwardens to the use of the poor.

In the reign, however, of this queen a schism began to develope itself in the newly established Protestant Church. Certain sectaries, who received the appellation of *Puritans*, deserting the use of the Liturgy, betook themselves, notwithstanding the Acts of Uniformity, to forms of worship of their own institution (*h*); and ultimately increasing in number, branched out into various divisions of religious opinions, and various modes of religious ceremonial, and church government. From this stock descended all those Protestant seceders from the Established Church, described at a later period as *Non-conformists*, and in modern times as *Dissenters* (*i*).

The jealousies to which these growing innovations gave rise, and the alarm at that period reasonably excited by the enterprising spirit of Popery, gave birth in the same reign, and in that of Jas. I., to a variety of laws, having for their object the repression of Non-conformity. It is unnecessary, however, to detail these provisions. It will suffice to state that in the beginning of the reign of the latter monarch, viz., by the statute of 3 Jac. I. c. 5, very rigorous provisions were made against *Popish recusants*, that is, persons refusing to conform to the ceremonies of the Church of England, or take the oath appointed against Papists.

During the rebellion, the laws against Protestant Sectaries were repealed (*j*); but they revived at the Restoration; and the parliament of Chas. II. proceeded to enforce systematically, by new measures of rigour, the principle of universal conformity to the Established Church. The first of these was the Corporation Act, 13 Car. II. st. 2, c. 1, by which it was provided, that no person should thereafter

(*h*) Hallam, Const. Hist. vol. i. 246, 251, 280.

(*i*) The Dissenters are usually divided into the three denominations of Presbyterians, Independents and Baptists; but as to church government, the Baptists are Independents.

(*j*) And by an ordinance 23 Aug. 1645 (which continued till the Restoration), to preach, write or print against the *directory* for the then established Presbyterian worship, subjected the offender, upon indictment, to a fine not exceeding 50*l*.

be elected to office in any corporate town, that should not within one year previously have taken the Sacrament of the Lord's Supper according to the rites of the Church of England; and every person so elected was also required to take (in addition to a certain oath and declaration since repealed (*k*)) the oaths of allegiance and supremacy (*l*). Afterwards, by 13 & 14 Chas. II. c. 4 (usually described as *the Act of Uniformity*), it was enacted, that the Book of Common Prayer, as then recently revised, should be used in every parish church and other places of public worship; that every schoolmaster and person instructing youth should subscribe a declaration of conformity to the Liturgy, and also to the effect of the oath and declaration mentioned in the act of 13 Car. II. st. 2, c. 1; and that no schoolmaster in a private house should instruct youth before he should also have obtained a licence for that purpose from the ordinary. It farther enacted, that no person should thenceforth be capable of holding any ecclesiastical promotion or dignity, or consecrating or administering the Sacrament, till he should be ordained priest according to episcopal ordination; and with respect to all ministers who then enjoyed any ecclesiastical benefice, it directed that they should, within a certain period, openly read morning and evening service according to the Book of Common Prayer, and declare before the congregation their unfeigned assent and consent to the use of all things therein contained, upon pain of being *ipso facto* deprived of their spiritual promotions. By this statute 2000 of the clergy, who refused to comply with its provisions, were in fact deprived of their preferments.

Another measure of the same reign was the Act against Conventicles, 22 Car. II. c. 1, by which all meetings consisting of five persons or more (or of that number besides the household, in case of a family) assembled for the exercise of religion in any manner than according to the practice of the Church of England, were prohibited, and

(*k*) 5 Geo. 1, c. 6, s. 2.

(*l*) As to these oaths, vide sup vol. ii. p. 422.

made liable to dispersion; and the persons attending thereat (particularly as preachers or teachers) subject to pecuniary forfeitures. This was soon followed by the celebrated Test Act, 25 Car. II. c. 2; by which it was provided, that all persons having any office, civil or military (*m*), (with the exception of some few of an inferior kind), or receiving pay from the crown, or holding a place of trust under it, should take the oaths of allegiance and supremacy, and subscribe a declaration against transubstantiation, and also receive the Sacrament of the Lord's Supper according to the usage of the Church of England. This provision had the effect of excluding not only Papists, but many classes of Protestant Dissenters also, from every considerable place of trust or public employment. But it was mainly pointed against the former; as was also a subsequent act in the same reign (30 Car. II. st. 2) (*n*), prohibiting any person from voting or sitting in parliament, until he should take the oaths of allegiance and supremacy, and subscribe a declaration against transubstantiation and the invocation of saints.

The Revolution of 1688, however, was the commencement of an era of more liberal legislation in matters of religion, as well as politics; and by the Toleration Act, 1 W. & M. st. 1, c. 18, (confirmed by 10 Ann. c. 2), all persons dissenting from the Church of England (except papists and persons denying the Trinity) were relieved from such of the acts against non-conformity, as prevented their assembling for religious worship according to their own forms, or otherwise restrained their religious liberty,—on condition of their taking the oaths of allegiance and supremacy, and subscribing a declaration against transubstantiation, and (in the case of dissenting *ministers*) subscribing also to certain of the Thirty-nine Articles. It was also made penal to disturb any congregation lawfully assembled, or to misuse their preachers; an offence which has been since pro-

(*m*) As to naval and military officers, see 57 Geo. 3, c. 92.

(*n*) See also on this subject, 1 Geo. 1, st. 2, c. 13, s. 16, 17.

hibited under still heavier penalties (*o*). But it was on the other hand provided, that no congregation should be allowed under that act, unless the place of their meeting was certified to and registered with the bishop, or arch-deacon, or court of quarter sessions. And it was also required, that the doors of the meeting-house should not be locked, barred, nor bolted. To these regulations some others were added for the relief of persons dissenting from the Church of England; among which is the following,—that when appointed to any parochial office which they may scruple (in respect of the oaths or otherwise) to undertake, they shall be at liberty to serve by deputy.

It was thought necessary, on the other hand, soon after the accession of the House of Brunswick, to extend some of the provisions of the Test Act to various descriptions of persons besides those holding civil and military offices; and it was consequently enacted by 1 Geo. I. st. 2, c. 13, 2 Geo. II. c. 31, and 9 Geo. II. c. 26, that not only such officers, but also all ecclesiastical and collegiate persons, preachers, teachers and schoolmasters, high constables, and practitioners of the law, should, at the peril of incurring loss of office and other forfeitures and disabilities, take and subscribe within six calendar months after their admission into preferment or practice, the oaths of allegiance, supremacy, and abjuration. By the form of the latter oath, as afterwards altered by 6 Geo. III. c. 53, the party taking it, abjures all allegiance to the descendants of the Pretender, and promises to maintain the succession of the crown according to the Act of Settlement (*p*).

These oaths (which impose, it will be observed, rather a political than a religious test) are still required by law (*q*); though it has been long the custom to pass an act before the end of every session of parliament, indemnifying those

(*o*) 52 Geo. 3, c. 155, s. 12.

(*p*) As to the Act of Settlement, vide sup. vol. ii. p. 490.

(*q*) But by 3 & 4 Will. 4, c. 49, *Quakers* and *Moravians* are permitted to make affirmation in all cases where an oath is required; and a form of

affirmation is given in lieu of the oath of abjuration: by 3 & 4 Will. 4, c. 82, a similar indulgence is granted to *Separatists*; by 1 & 2 Vict. c. 77, to any person who shall have been a *Quaker* or *Moravian*.

who may happen to have neglected to take them, and against whom no judgment shall have yet actually passed for such offence ; upon condition, however, of their repairing their omission within a certain specified period. But with respect to such of the penal laws above enumerated, as tend to the enforcement of religious uniformity, they are all either abrogated, or made subject to important relaxations or exceptions.

First, it was provided in favour of dissenting ministers, by 19 Geo. III. c. 44, that any dissenting preachers or teachers may be entitled to all the benefit of the Toleration Act, by taking the oaths and subscribing the declaration against popery therein mentioned, and also making or subscribing a declaration professing themselves to be Christians and Protestants, and that they believe the Scriptures to contain the revealed will of God, and to be the rule of doctrine and practice. The same act relieves every dissenting minister, or other Protestant dissenter conforming to these conditions, from the provisions of 13 & 14 Car. II. c. 4, by which they were prohibited from keeping schools or instructing youth ; but there is a proviso that nothing therein contained shall extend to the enabling any dissenter to hold the mastership of a college or other endowed school, unless endowed since the 1st year of William and Mary, for the immediate benefit of Protestant dissenters. Then followed the 52 Geo. III. c. 155, by which both ministers and hearers were relieved from the necessity of taking any oaths or subscribing any declaration, unless required so to do by some justice of the peace : and by which it is enacted that all persons officiating in or resorting to religious establishments duly certified as required by 1 W. & M. st. 1, c. 18, shall be as fully relieved from all penalties relating to religious worship, as if they had made the declaration and taken the oaths required by any previous act (*q*). In order, however, to prevent irregular

(*q*) By stat. 5 Geo. 1, c. 4, however, no mayor or principal magistrate may appear at any dissenting meeting with the insignia of his office, on pain

conventicles of any persons not duly certified, whether they in fact dissent from the Church of England or not, this act prohibits (after repealing 22 Car. II. c. 1), under a penalty not exceeding 20*l.*, all assemblies for the religious worship of Protestants in places not certified, at which more than twenty persons besides the family shall be present. By this statute it is also enacted (in confirmation of a like provision in the Act of Toleration) that every teacher or preacher of a congregation duly certified, who shall employ himself solely as such, and not engage in any trade or business except that of schoolmaster, and who shall take the oaths and subscribe the declaration, shall be exempt from serving on juries or bearing parochial offices; to which is added an exemption from serving in the militia. In the next year also was passed the statute 53 Geo. III. c. 160 (*r*), repealing that clause of the Toleration Act which excepted persons denying the Trinity from the benefit of its enactments.

The dissenters, however, still remained, notwithstanding these provisions, subject to the obligation imposed by the Corporation and Test Acts, on all those who were admitted to any office, of taking the Sacrament of the Lord's Supper according to the rites of the Church of England; but this last restraint upon their religious freedom was at length removed by the 9 Geo. IV. c. 17, by which so much of these and other acts as requires the taking of the Sacrament is repealed as to all persons whatever, and a new form of declaration substituted. This declaration is to the effect that "upon the true faith of a Christian" the party will never exercise any power, authority, or influence, by virtue of the office in question, to injure, weaken, or disturb the English Church, or its bishops and clergy; and must be made in general by every person admitted to of disability to hold that or any other office.

(*r*) By a recent act, 7 & 8 Vict. c. 45, the benefits of 1 W. & M. sess. 1, c. 18; 19 Geo. 3, c. 44; and 53

Geo. 3, c. 160, are extended to meeting-houses and charities founded for dissenters prior to those acts, and unlawful till those acts passed.

office, who in the former state of the law would have been bound to take the Sacrament upon such his admission ; but no naval officer below the rank of rear-admiral, or military officer below that of major-general or colonel of militia, is obliged to make the declaration ; nor any officer of the customs, excise, stamps, taxes, or post-office (r).

These various acts of toleration operated, however, to the exclusive benefit of Protestant dissenters, and afforded no relief to papists. With respect to the latter, the progress of emancipation was slower and more reluctant. By statutes, however, of 18 Geo. III. c. 60, 31 Geo. III. c. 32, and 43 Geo. III. c. 30, most of the severer penalties and disabilities to which they were formerly subject (s), were removed on condition of their qualifying by such oaths and declaration as in those acts respectively provided ; and by 10 Geo. IV. c. 7, commonly called the Catholic Emancipation Act, Roman Catholics were restored in general to the full enjoyment of all civil rights, except that of holding ecclesiastical offices, and certain high appointments in the state. By the provisions of this statute all enactments by which any declaration against transubstantiation, the invocation of the saints, or the sacrifice of the mass, were required from any persons, as qualifications for sitting in parliament or otherwise, are repealed ; and persons professing the Roman Catholic religion, upon taking and subscribing an oath prescribed by the act (which comprises, among other things, the abjuration of any intention to subvert the church establishment, and an oath never to exercise any privilege to disturb or weaken the Protestant religion or Protestant government), are relieved from all disabilities and penalties whatever, and made competent to sit in parliament, to vote at parliamentary elections, and to be members of lay corporations. They

(r) See 57 Geo. 3, c. 92. By 5 & 6 Will. 4, c. 28, the declaration needs not be made by sheriffs of counties corporate ; and by 1 & 2 Vict. c. 5, and c. 15, a different form of declaration is provided for Quakers, Mora-

vians, and Separatists. Where the declaration is refused, the election is *ipso facto* void. *R. v. Humphery*, 10 A. & E. 365.

(s) See the enumeration of the laws against them, 4 Bla. Com. 56.

are also qualified, upon taking and subscribing the same oath (which is to stand in place of all other tests whatever), to exercise any franchise or civil right except that of presenting to benefices, and to hold any office, with the exception of the following,—the office of guardian, justice, or regent of the united kingdom ; of lord high chancellor, or commissioner or keeper of the great seal ; of lord lieutenant, deputy, or chief governor of Ireland ; of high commissioner of general assembly of Scotland ; or any office in the church, or the ecclesiastical courts, or in the universities, colleges, or public schools.

Doubts, however, having been still entertained as to the right of Roman Catholic subjects in England to acquire and hold property for the support of religious worship, and for educational or charitable purposes, it was afterwards by another act of the 2 & 3 Will. IV. c. 115, provided that they should be subject, in this particular, to the same laws as were applicable to Protestant dissenters. And the triumph of toleration has been now consummated by the act of 7 & 8 Vict. c. 102, which recites and repeals all such enactments as still remained in force, however fallen into oblivion, calculated in any manner to oppress the Roman Catholic subjects of the realm, on account of their religious persuasion (*t*).

Thus amply has the law at length provided for the freedom of religious opinion. In all other respects, however, the rights and pre-eminence of the established church have been hitherto maintained inviolate ; and though no longer upheld by penal laws against non-conformity, she retains, in full possession, all those dignities and endowments which, at the period of the Reformation, were allotted exclusively to her ministers.

(*t*) Some disqualifying provisions essential to the security of the established church still remain unrepealed. See 3 Jac. 1, c. 5, and 7 & 8 Vict. c. 102, as to the inability of papists to present to benefices, &c. ; 10 Geo. 4,

c. 7, s. 12, as to their inability to hold certain offices in the state ; and s. 29—31 of the last mentioned act, as to Jesuits and monks coming into the realm without licence.

CHAPTER III.

OF THE ENDOWMENTS AND PROVISIONS OF THE
CHURCH.

THE endowments and provisions belonging to the different ecclesiastical authorities, as such, comprise lands, advowsons, and tithes; all of which have been occasionally annexed to ecclesiastical preferments by the munificence of antient or modern donors; the last are incident of common right to every parochial church. But in a large proportion of parishes the tithes have now been commuted (as will be presently explained) into rent-charges,—which must be considered as in some measure a different species of endowment,—though in truth it is but the representative and equivalent for tithe, and subject in many respects to the same legal incidents (*a*).

These endowments we propose to consider, first, as regards the subject of property itself; secondly, the estates which ecclesiastical persons, as such, may hold therein; thirdly, the power of alienation which they are competent to exercise.

I. As regards the subject of property.

1. And herein, 1st, as to *lands* (a term which, it is to be recollected, includes houses and buildings) (*b*), there are but few particulars to be noticed in respect of these when held by ecclesiastical persons; the incidents relating to lands in general, whether held by clergymen or laymen, having been sufficiently explained in an earlier part of the work.

We may observe, however, that the boundaries of church lands are often subject to great uncertainty; and therefore

(*a*) 6 & 7 Will. 4, c. 71, s. 71.

(*b*) Vide sup. vol. i. p. 157.

by 2 & 3 Will. IV. c. 80 (reciting that the archbishops and bishops, deans and chapters, deans and other dignitaries and officers of the several cathedral and collegiate churches and chapels, and the societies of the colleges and halls in the universities of Cambridge and Oxford, and of the colleges of Winchester and Eton, are proprietors of divers manors, messuages, lands, tithes, and hereditaments, and in many cases the boundaries or quantities and identity of such property are unknown or disputed), it is provided that it shall be lawful for any such corporation sole or aggregate, with such consent as in the act mentioned, to enter into agreement with their tenants or undertenants, or the owners of adjoining hereditaments, to refer any such disputed point to arbitration.

We may remark, too, that the property of ecclesiastical persons, besides other possessions, generally includes official houses of residence; in which, as explained in a former place(c), the law requires them actually to reside. These they are also bound, both by statute and by the common law of the realm, to keep in repair; and they may not only be compelled to do so during their incumbency, by authority of the bishop of the diocese(d), but if they commit waste upon them, or allow them to go to waste, remedy may, after their deaths, be had by their successors against their personal representatives, for such *dilapidations* (as it is called); and that either in the ecclesiastical or temporal courts(e). Numerous provisions, moreover, as before noticed, are made by law, to enable ecclesiastical persons to repair or rebuild their residences or provide new ones. The methods of doing this are by raising money to a limited amount (according to the value of the benefice), by mortgage of its profits (which money the

(c) Vide sup. p. 83.

(d) 13 Eliz. 10; 1 & 2 Vict. c. 106, ss. 35, 41; North v. Barker, 3 Phill. 309; Rogers's Ecc. L. 307.

(e) 13 Eliz. c. 10; 14 Eliz. c. 11,

s. 18; Ratcliffe v. D'Oyley, 2 T. R. 630; Wise v. Metcalfe, 10 B. & C. 299; Bird v. Relph, 4 B. & Adol. 826; 2 Ad. & El. 773; Whinfield v. Watkins, 2 Phill. 3; Rogers, ubi sup.

governors of Queen Anne's bounty are specially empowered to advance), or by sale or exchange of the present houses, in order to obtain others that are more convenient. The principal statutes on which subject are 17 Geo. III. c. 53 (commonly called Gilbert's Act), 1 & 2 Vict. c. 23, and 5 & 6 Vict. c. 26 (*f*). In addition to which, we may remark that by 1 & 2 Vict. c. 106 (*g*), every bishop is *required*, on avoidance of any benefice, to issue a commission to ascertain whether there is a fit house of residence, and supposing none to exist, and the profits to exceed 100*l.* per annum, to ascertain whether such house can be conveniently provided; and thereupon, by mortgage of the profits, to raise the sum required, or otherwise state in detail his reasons for not doing so, at his next annual return to her majesty in council.

With respect to a rector and vicar in particular, it is also to be observed, that he is generally seised not only of the parsonage or vicarage house, but of some portion of land (or *glebe*, as it is called (*h*)) attached to his benefice, as part of its endowment. And by a late statute, 5 & 6 Vict. c. 54 (*i*), it is provided that the commissioners appointed to carry into effect the commutation of tithes shall have power to ascertain and define the boundaries of the glebe lands of any benefice, or, with consent of the ordinary and patron, to exchange the glebe lands for other lands within the same or any adjoining parish, or otherwise conveniently situated. A rector or vicar is also seised, in every case, of the edifice of the church itself. In rectories, not merely the body of the church, but the chancel and the churchyard also, are the freehold of the rector (*k*). In vicarages, the body of the church and the churchyard are the vicar's freehold; the chancel that of the

(*f*) See the enumeration of these statutes, sup. p. 86, n. (*b*).

(*g*) Sect. 62.

(*h*) *Gleba est terra in qua consistit dos ecclesie*.—Com. Dig. Dismes, B. 2, where it is said that every church of

common right ought to have a manse and glebe.

(*i*) Sect. 5.

(*k*) *Clifford v. Wicks*, 1 B. & Ald. 498; *Beckwith v. Harding*, ib. 508; *Rich v. Bushnell*, 4 Hagg. 164.

impropriator (*l*). Yet with the exception of the chief pew in the chancel, which belongs to the rector or impropriator (*m*), the disposal of the seats appertain not to rector, vicar or impropriator; but, as formerly shown, to the ordinary, and to the churchwardens, to whom the authority of the ordinary, in this respect, is delegated (*n*). Nor can a monument be set up without the ordinary's consent (*o*). So an aisle or side chapel in a church, or a pew in its nave or body, may be granted by faculty of the ordinary, to an individual and his heirs, as appurtenant to a particular message in the parish; and a man may prescribe for these, as so appurtenant, without showing a faculty, if he can prove that they have been used and repaired from time immemorial, by those under whom he claims; for such immemorial enjoyment is evidence of a faculty formerly obtained (*p*). As to the repairs of the body of the church and inclosure of the churchyard, they fall of common right on the parishioners (*q*); but those of the chancel, on the parson, or supposing the benefice to be a vicarage, then, generally, on the impropriator (*r*).

Among the subjects of church property we enumerated *advowsons* and *tithes*; and to these it will now be proper to devote a more particular attention.

2. As to *Advowsons*.—Advowsons are of the class of hereditaments incorporeal; but were simply mentioned, without being discussed, in that part of the second volume allotted to incorporeal hereditaments in general (*s*); because, though capable of being held, and in fact held indifferently, both by laymen and ecclesiastics (*t*), their close connection

(*l*) Wats. C. L. 391.

(*m*) Rogers, Ec. L. 171; Clifford v. Wicks, ubi sup.

(*n*) Vide sup. p. 91; Rogers, Ec. L. 179.

(*o*) Beckwith v. Harding, ubi sup.; Rich v. Bushnell, ubi sup.

(*p*) Wats. C. L. 643, 644; 2 Bla. Com. 429.

(*q*) As to this, vide sup. p. 90; 2

Inst. 489, 653.

(*r*) Wats. C. L. 391, where it is said that this is not the case in *London*, as to which see also n. (*g*), sup. p. 92.

(*s*) Vide sup. vol. ii. p. 3.

(*t*) As to the origin of ecclesiastical property in advowsons, vide Rennell v. Bp. of Lincoln, 3 Bing. 223; 7 B. & C. 113; Mirehouse v. Rennell, 8 Bing. 490.

in other respects with the law of the church, seemed naturally to assign them to the present division of our work.

An advowson (*advocatio*) [is the right of presentation to a church or ecclesiastical benefice] (*u*), and this word [signifies in *clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*; and he who has the right of advowson is called the patron of the church. For when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common, (from whence, as was formerly mentioned (*x*), arose the division of parishes,) the lord who thus built a church and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or in a word, the patron (*y*).] And this power is, by derivation of title from the lords of manors, now claimed by many other private persons and many corporations, both lay and ecclesiastical (*z*). But it is to be observed, that an alien or papist cannot exercise the rights of a patron. If the former purchase an advowson, the crown shall present; if the latter, the Universities of Cambridge and Oxford (*a*). An incumbent may be constituted, as explained in a former chapter (*b*), either by way of presentation, collation or donation, as the case may be; and according to this distinction, an advowson is said in these cases respectively to be either *presentative*, *collative* or *donative* (*c*).

(*u*) For the law on this subject generally, see Mirehouse on Advowsons.

(*x*) Vide sup. vol. i. p. 110, 111.

(*y*) Co. Litt. 119 b; Gibs. Cod. 7, 57, 2d ed. This original of the *jus patronatus*, viz. building and endowing the church, appears also to have been allowed in the Roman empire. Nov. 26, t. 12, c. 2; Nov. 118, c. 23.

(*z*) Municipal corporations, however, are disabled from exercising

church patronage; 5 & 6 Will. 4, c. 6, s. 139, and 2 Vict. c. 31; 2 Scott, N. R. 394.

(*a*) Rogers, Ec. L. 17; 3 Jac. 1, c. 5; 1 W. & M. st. 1, c. 26; 12 Ann. st. 2, c. 14, s. 1; 11 Geo. 2, c. 17; Edwards v. Bishop of Exeter, 5 Bing. N. C. 654.

(*b*) Vide sup. p. 81.

(*c*) 2 Bl. Com. 22; Co. Litt. 119 b.

[Advowsons also are either advowsons *appendant* or advowsons *in gross* (*a*). Lords of manors being originally the only founders and of course the only patrons of churches (*b*), the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called an advowson *appendant* (*c*); and it will pass or be conveyed together with the manor, as incident and *appendant* thereto, by a grant of the manor only, without adding any other words (*d*). But where the property of the advowson has been once separated from the property of the manor by legal conveyance, it is called an advowson *in gross* or at large;] being annexed no longer to the manor or lands, but to the person of the owner (*e*): and where the inheritance either of the manor or the advowson has been thus separately conveyed, the advowson remains for ever *in gross*, and cannot be *appendant* any more (*f*). When thus *in gross*, it may be conveyed by deed without livery, or by conveyance operating under the Statute of Uses (*g*). Not only the advowson itself, but the next or any number of future *presentations* may, during an existing incumbrency, be conveyed by the owner (*h*); and the grantee of a next presentation becomes, *pro hac vice*, the patron. And as to either species of patron, this rule is to be observed, that if he dies after a vacancy has happened, and before it is filled up, the right to present for the then next turn (being as it were a fruit fallen) is considered as personal not real estate, and goes to his executor and not to his heir (*i*). The exercise of his right by a patron, of either description, is also subject to the restrictions imposed by the law of *lapse* and the law of *simony*.

[First. *Lapse* is a species of forfeiture, whereby the right

(*a*) Vide sup. vol. ii. p. 30.

(*b*) Co. Litt. 119 b.

(*c*) Ibid. 121.

(*d*) Ibid. 307.

(*e*) Ibid. 120.

(*f*) 2 Bl. Com. 22.

(*g*) Vide sup. vol. ii. p. 33.

(*h*) Co. Litt. 249 a; Plowd. 150;

Crisp's case, Cro. Eliz. 164; Elvis v.

Apb. of York, Hob. 322; Alston v.

Atlay, 7 A. & E. 289; Rogers, Ecc. L.

9.

(*i*) Rennell v. Bp. of Lincoln, 7 B.

& C. 113.

[of presentation to a church accrues to the ordinary, by neglect of the patron to present; to the metropolitan, by neglect of the ordinary; and to the crown, by neglect of the metropolitan. For it being for the interest of religion and the good of the public that the church should be provided with an officiating minister, the law has therefore given this right of lapse in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time, though not by the authority (*k*), of the Council of Lateran (*l*), which was in the reign of our Henry the Second, when the bishops first began to exercise universally the right of institution to churches (*m*). And therefore, where there is no right of institution, there is no right of lapse; so that no *donative* can lapse to the ordinary (*n*), unless it hath been augmented by Queen Anne's bounty;] when, by statute, it is made subject to that incident (*o*). And it is also to be observed, that [no right of lapse can accrue when the original presentation is in the crown (*p*).

The term in which the title to present by lapse accrues from the one to the other successively, is six calendar months(*q*),] that is, 182 days(*r*); [and this exclusive of the day of the avoidance (*s*). But if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in (*t*); for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is

(*k*) 2 Roll. Ab. 54, Presentment, Lapse (O).

(*l*) Bract. l. 4, tr. 2, c. 3.

(*m*) Vide sup. p. 82; 2 Bl. C. 23.

(*n*) Bro. Ab. tit. Quare Impedit; Fitton v. Hall, Cro. Jac. 518.

(*o*) 1 Geo. 1, st. 2, c. 10, s. 6, 7; Rogers, Ecc. L. 354.

(*p*) St. 17 Ed. 2, c. 8; 2 Inst. 273.

(*q*) Catesby's case, 6 Rep. 62; Regist. 42.

(*r*) Wats. C. L. 109; Bp. of Peterborough v. Catesby, Cro. Jac. 166; 2 Inst. 360.

(*s*) 2 Inst. 361; Wats. C. L. 109.

(*t*) Gibs. Cod. 769.

[good, and the bishop is bound to institute the patron's clerk (*u*). For as the law only gives the bishop this title by lapse to punish the patron's negligence, there is no reason that if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the benefice, and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop (*x*); for he had no permanent right and interest in the advowson as the patron hath, but merely a temporary one, which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the crown, prerogative here intervenes and makes a difference; and the patron shall never recover his right till the king has satisfied his turn by presentation, for *nullum tempus occurrit regi* (*y*). And therefore it may seem as if the church might continue void for ever, unless the crown shall be pleased to present, and a patron thereby be absolutely defeated of his advowson; but to prevent this inconvenience the law has lodged a power in the patron's hands of, as it were, compelling the crown to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king, indeed, by presenting another, may turn out the patron's clerk, or, after induction, may remove him by] bringing an action called a [*quare impedit*; but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation (*z*).

In case the benefice becomes void by death, or cession(*a*) through plurality of benefices, there the patron is bound to take notice of the vacancy, at his own peril;] and the

(*u*) 2 Inst. 273.

(*x*) 2 Roll. Ab. 368.

(*y*) Doctor and Student, d. 2, c. 36;

R. v. Abp. of Canterbury, Cro. Car.

355. As to this maxim vide sup.

vol. ii. p. 504.

(*z*) Baskerville's case, 7 Rep. 28;

Beverley v. Cornwall, Cro. Eliz. 44.

(*a*) As to cession, vide sup. p. 86.

six months date from the period of the death or cession (*b*); [for these are matters of equal notoriety to the patron and ordinary. But in case of a vacancy by resignation or canonical deprivation (*c*), or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron;] and the six months shall date only from the time when such notice shall be given (*d*); though, as to this, a distinction is made in the case of an *ecclesiastical* patron, who is held not entitled to notice of insufficiency, because he is competent to choose an able clerk (*e*). [Neither shall any lapse accrue to the metropolitan or king] in cases where the bishop is thus precluded, by neglect to give notice, from collation; [for it is universally true, that neither the archbishop nor the king shall ever present by lapse but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time; for the first step or beginning faileth, *et quod non habet principium, non habet finem* (*f*). If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber, by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong (*g*). Also if the right of presentation be litigious and contested, and an action be brought to try the title,] making the bishop a defendant, [no lapse shall incur until the question of right be decided (*h*).]

Secondly, *Simony* is also a species of forfeiture, whereby [the right of presentation to a living is forfeited and vested

(*b*) Semb. and not from the time when patron could reasonably have had notice; Wats. C. L. 5; Rogers, Ec. L. 488.

(*c*) Ibid.

(*d*) 2 Inst. 632; *Bedinfield v. Abp. of Canterbury*, Dy. 292; *Hele v. Bp. of Exeter*, 2 Salk. 539; *Rookesby's case*, Cro. Eliz. 119; 2 Roll. Ab. 364; 2 Burn, Ec. L. 157. Where the avoidance is by the clerk's having been

ordained under the proper age, notice is to be given by the ordinary, before a lapse can accrue. 44 Geo. 3, c. 43.

(*e*) 2 Roll. Ab. 364; 2 Burn, Ec. L. 157.

(*f*) Co. Litt. 344, 345.

(*g*) Co. Litt. 344.

(*h*) 2 Bl. C. 278; Wats. C. L. 112; 2 Burn, Ec. L. 358; Rogers, Ec. L. 488.

[*pro hac vice* in the crown. Simony means the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward (*i*). It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders (*k*) seems to approach nearer to his offence. It was by the canon law a very grievous crime; and is so much the more odious because, as Sir E. Coke observes (*l*), it is ever accompanied with perjury; for the presentee is sworn to have committed no simony.] Whether it was an offence punishable at the common law has been doubted (*m*); and though the clerk who committed simony was always subject to ecclesiastical censures (*n*), these were [not efficacious enough to repel the notorious practice of the thing;] particularly as they [did not affect the simoniacal patron;] so that [divers acts of parliament have been made to restrain it by means of civil forfeitures (*o*).] And these shall be briefly considered in this place.

By the statute 31 Eliz. c. 6, it is for avoiding of simony enacted, that if any person, for any sum of money or reward, or promise of money or reward, shall present or collate, admit, institute, induct, or instal any other person to any ecclesiastical benefice or dignity, [both the giver and taker shall forfeit two years' value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same (*p*);] and [such presentation also shall be void, and the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it for that turn; but if the presentee dies without being convicted of such simony in his lifetime, it is enacted by stat. 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron, on pretence of a

(*i*) *Baker v. Rogers*, Cro. Eliz. 790.

(*k*) As to this, vide sup. p. 56.

(*l*) 3 Inst. 156; Can. 40.

(*m*) Blackstone says it was *not* an offence at common law, 2 Bl. C. 278; but see Bp. of St. David's v. Lucy, 1 Ld. Raym. 449; Greenwood v. Bp. of

London, 5 Taunt. 745; and the other authorities cited Rogers, Ec. L. 840.

(*n*) Spelm. Concil. 2, 12; vide Whish v. Hesse, 3 Hagg. 659; Degge, 36.

(*o*) 2 Bl. Com. 279.

(*p*) 4 Bl. C. 63.

[lapse to the crown or otherwise.] The same statute of Eliz. also contains provisions against corrupt resignations and exchanges. And [by the statute 12 Anne, st. 2, c. 12, if any person, for] money or reward, or promise of money or reward, [shall procure in his own name, or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract, and the party is subject to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

Upon these statutes many questions have arisen with regard to what is, and what is not, simony; and, among others, these points seem to be clearly settled.] 1. That the sale of an *advowson* (whether the living be full or not) is not simoniacal, unless connected with a corrupt contract or design as to the next presentation; though if an advowson be granted during the vacancy of the benefice, the presentation on that vacancy can in no case pass by the grant (*q*). 2. [That to purchase a] next [presentation, the living being actually vacant, is open and notorious simony; this being expressly in the face of the statute (*r*). 3. That for a *clerk* to bargain for the next presentation, the incumbent being sick and about to die, was simony even before the statute of Queen Anne (*s*); and now by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented at any future time to the living, is direct and palpable simony.] But, 4, a bargain by *any other person* for the next presentation, (even if the incumbent be *in extremis*,) if without the privity, and without any view to the nomination, of the particular clerk afterwards presented, is not

(*q*) As to sale of an advowson, see Bac. Ab. tit. Simony, 189; Grey v. Hesketh, Ambl. 268; Barret v. Glubb, 2 Bl. Rep. 1052; Bishop of Lincoln v. Wolforstan, 2 Wils. 174; 3 Burr. 1504, S. C. in error; Greenwood v. Bishop of London, 5 Taunt. 745; Fox

v. Bishop of Chester, 6 Bing. 1; Alston v. Atlay, 6 Nev. & M. 686.

(*r*) Baker v. Rogers, Cro. Eliz. 788; Moor, 914, S. C.

(*s*) Winchcombe v. Bp. of Winchester, Hob. 165.

simony (*s*). 5. [That if a simoniacal contract be made with the patron, the clerk] presented [not being privy thereto,] the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron (*t*); but the clerk, who is innocent, does not] otherwise [incur any disability or forfeiture (*u*). 6. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal (*v*), provided the patron or his relations be not benefited thereby (*x*); for this is no corrupt consideration moving to the patron.] In addition to these points, we may notice that it has been a frequent practice for the patron to take from the presentee a bond, or other engagement, to resign the benefice at a future period, in favour of some particular individual named by the patron, or at the request of the latter, generally; and the validity of such engagements has been the subject of much discussion (*y*). By the later authorities a contract of either of these descriptions has been deemed within the prohibition of the laws relating to simony, and consequently void. They are now, however, to a certain extent, sanctioned by positive law. For by 9 Geo. IV. c. 94 (*z*), any such engagement, in writing, if made to the intent and purpose (manifested by the terms of it) that some one nominee, or one of two nominees, shall be presented, shall be valid to all intents and purposes; subject, however, to these provisions, that where there are two nominees, each of them shall be in a certain degree of relationship or connection with the patron; and that the writing shall in all cases be deposited within two months with the registrar of the diocese, open to public inspection; and also that the resignation made in pursuance of such engagement

(*s*) *Fox v. Bishop of Chester*, ubi sup.; 3 Bligh, N. S. 123, S. C.

(*t*) See *Whish v. Hesse*, 3 Hagg. 659.

(*u*) 3 Inst. 154; *R. v. Bishop of Norwich*, Cro. Jac. 385.

(*v*) *Noy*, 142.

(*x*) *Peele v. Capel*, Stra. 534.

(*y*) *Dashwood v. Peyton*, 18 Ves. 37; *Jac. & Walk.* 283; *Fletcher v. Lord Sondes*, 3 Bing. 502; 5 B. & Ald. 835, S. C.; *Bishop of London v. Pfyttche*, 1 East, 487, (n).

(*z*) See also 7 & 8 Geo. 4, c. 25; *Burton*, Comp. 416.

shall be followed by a presentation, within six months, of the person named.

3. *Tithes* (*a*) (under which head we shall have occasion to refer also to tithe-rent charges) are, like advowsons, a species of incorporeal hereditaments (*b*); and, like them, are capable of being held either by laymen or ecclesiastics. But tithes are properly, and for the most part, in the hands of ecclesiastics only (*c*); and belong to laymen chiefly in the character of impropiators; the nature of whose rights has already been sufficiently explained in a former chapter (*d*).

Tithes [are defined to be the tenth part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants; the first species being usually called *predial*, as of corn, grass, hops and wood (*e*); the second *mixed*, as of wool, milk, pigs, &c. (*f*), consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; the third *personal*, as of manual occupations, trades, fisheries and the like; and of these only the tenth part of the clear gains and profits is due;] nor is tithe generally due in respect of these at all, except so far as the particular custom of the place may authorize the claim (*g*). From the above definition, it may be inferred that whatever is [of the substance of the earth, or is not of annual increase, as stone, lime, chalk and the like,] is not in its nature titheable; nor is tithe demandable, except by force of special custom, in respect to animals *feræ naturæ*.

In our remarks on this subject we shall consider—[First. The original of the right of tithes; Secondly. In whom that right at present subsists; Lastly. Who may be discharged, either totally or in part, from payment.

(*a*) From the Saxon *Teotha*, tenth.
Jac. Dict.

(*b*) Vide sup. vol. ii. p. 3.

(*c*) Bac. Ab. Tythes, (E).

(*d*) Vide sup. p. 68.

(*e*) 1 Rol. Ab. 635; 2 Inst. 649.

As to the manner of taking tithe of turnips, see 5 & 6 Will. 4, c. 75.

(*f*) 1 Rol. Ab. 635; 2 Inst. 649.

(*g*) 1 Rol. Ab. 656; 2 & 3 Ed. 6, c. 13; 7 Bro. P. C. 3; Com. Dig.

Dismes, (E 3).

[First. As to their original ; the title of the clergy to them cannot now be put upon any divine right, though such a right certainly commenced, and, it would seem, as certainly ceased, with the Jewish theocracy. Yet an honourable and competent maintenance for the ministers of the Gospel is undoubtedly *jure divino*, whatever the particular mode of that maintenance may be.]

The establishment of tithes in the Christian Church is generally ascribed to the fourth century (*h*), though [we cannot precisely ascertain the time when they were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons, by Augustine the monk, about the end of the sixth century ; but the first mention of them, perhaps, in any written English law, is in a constitutional decree made in a synod held A.D. 786(*i*), wherein the payment of tithes in general is strongly enjoined. This canon or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators and people ; which was a very few years later than the time that Charlemagne established the payment of them in France (*j*), and made that famous division of them into four parts ; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy (*k*).

The next authentic mention of them is the *feodus Edwardi et Guthruni*, or the laws agreed upon between King Guthrun the Dane, and Alfred and his son Edward the elder, successive kings of England, about the year 900. This was a kind of treaty between these monarchs, which may be found at large in the Anglo-Saxon laws (*l*) ; wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under

(*h*) See *Rennell v. Bp. of Lincoln*,

7 Barn. & Cres. 153.

(*i*) Selden 8, s. 2.

(*j*) A. D. 778.

(*k*) Seld. c. 6, s. 7.

(*l*) Wilkins, p. 51.

[his dominion ; and accordingly we find (*l*) the payment of tithes not only *enjoined*, but a *penalty* added upon non-observance ; which law is seconded by the laws of Athelstan (*m*), about the year 930.

Secondly. We are next to consider the persons to whom tithes are due. And upon their first introduction, (as hath formerly been observed (*n*),) though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased (*o*) ; which were called arbitrary consecrations of tithes ; or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common (*p*). But when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister ; first, by common consent or the appointment of lords of manors, and, afterwards, by the written law of the land (*q*).

However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John (*r*) ; which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors, who endeavoured to wean the people from paying their dues to the secular or parochial clergy, (a much more valuable set of men than themselves,) and were then in hopes to have drawn, by sanctimonious pretences of extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks, or grant them to some

(*l*) Cap. 6.

(*p*) Seld. c. 9, s. 4.

(*m*) Cap. 1.

(*q*) LL. Edgar. c. 1 and 2 ; Canut.

(*n*) Sup. vol. i. p. 110.

c. 11.

(*o*) 2 Inst. 646 ; Slade v. Drake,
Hob. 296.

(*r*) Seld. c. 11.

[abbey already erected, since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses for ever singing for his soul. But in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent the Third (*s*) about the year 1200, in a decretal epistle sent to the Archbishop of Canterbury, and dated from the palace of Lateran, which has occasioned Sir Henry Hobart and others to mistake it for a decree of the Council of Lateran, held A. D. 1179 (*t*), which only prohibited what was called the infeudation of tithes, or their being granted to mere laymen (*u*); whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries (*x*). This epistle, says Sir Edward Coke (*y*), bound not the lay subjects of this realm, but being reasonable and just it was allowed of, and so became *lex terræ*. This put an effectual stop to all the arbitrary consecrations of tithes, except some footsteps, which still continue in those *portions* of tithes] (as they are called) [which the parson of one parish hath, though rarely, a right to claim in another (*z*); for it is now universally held that tithes are due of common right to the parson of the parish, unless there be a special exception; which parson of the parish, we have seen in a former chapter (*a*), may be either the actual incumbent, or else the impropiator of the benefice; appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy by way of substitute to arbitrary consecration of tithes.] In impropriations, indeed, the vicar, as

(*s*) Opera Innocent. III. tom. 2, p. 452.

(*t*) Vide *Steel v. Houghton*, 1 H. Bl. 62.

(*u*) Decretal. l. 3, t. 30, c. 19.

(*x*) Ibid. c. 2, 6.

(*y*) 2 Inst. 641.

(*z*) 2 Inst. 641, 653.

(*a*) Sup. p. 68.

well as the impropiator (or rector), is generally entitled to some part of the tithes; but as between these parties, it is to be observed, that all tithes, *primâ facie* and by presumption of law, belong to the latter, except such as can be shown, by evidence, to belong to the former (*b*). Such evidence may consist, however, either of the production of a deed of endowment, vesting certain tithes in the vicar, or of such proof of long usage as is sufficient to raise the presumption that an endowment of that description, though now lost, was antiently made (*c*). It sometimes happens that an endowment is found to vest all the “small” tithes *eo nomine* in the vicar (*d*), which raises the question what are *small* and what *great* tithes—to determine which, no clear line of demarcation seems ever to have been drawn; though tithes mixed and personal are universally agreed to fall always under the former denomination (*e*), and tithes of corn, hay and wood, are generally comprised under the latter (*f*).

[We observed that tithes are due to the parson of common right, unless by special exception. Let us therefore see, thirdly, who may be exempted from the payment of tithes (*g*).]

And here, first, we may observe that some persons are exempt by personal privilege. [Thus the crown by its prerogative is discharged from all tithes (*h*). So a vicar

(*b*) *Daws v. Beno*, 1 B. & C. 763; 2 Bligh, N. S. 83.

(*c*) *Jackson v. Walker*, Gwill. 1231; 2 Bligh, N. S. 94, 103.

(*d*) *Bac. Ab. Tythes*, (K).

(*e*) *Ibid*.

(*f*) *Com. Dig. Dismes*, G. 1. Small tithes are sometimes called *privy* tithes. Vide *Cleev. Hall*, 7 C. & F. 744.

(*g*) This of course is meant to refer only to the ordinary methods of exemption, and not to those of a local kind. For it sometimes happens that tithes are extinguished in particular parishes by act of parliament, such as inclosure acts. In London, an an-

nual sum of money is paid in lieu of tithes, vide 27 Hen. 8, c. 21; 37 Hen. 8, c. 12. As to churches destroyed by the fire of London, 22 & 23 Car. 2, st. 2, c. 15, and 44 Geo. 3, c. lxxxix. As to particular parishes, 4 Geo. 4, c. cxviii; 7 Geo. 4, c. cxvi; 6 Geo. 4, c. clxxvi; 1 Geo. 4, c. lix; 7 Geo. 4, c. liv. On the whole subject of tithes in London, see *Pulling's Law of London*, 254.

(*h*) *Wright v. Wright*, Cro. Eliz. 511. According to other authorities, however, the crown is not discharged except by special prescription; *Bac. Ab. Tythes* (Q.) 1; *Hard*. 315.

[shall pay no tithes to the rector, nor the rector to the vicar; the maxim in such cases being that *ecclesia decimas non solvit ecclesiæ* (i). But these privileges are not annexed to the land, but personally confined to the crown and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally titheable (k).]

Next, all spiritual persons or corporations, as monasteries, abbots, bishops and the like, have been always capable of having their lands totally discharged of tithes by various ways (l), as, 1, by real composition; 2, by the pope's bull of exemption; 3, by unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession; 4, by prescription; having never been liable to tithes by being always in spiritual hands; 5, by virtue of their order; as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes (m). Though upon the dissolution of abbeyes by Henry VIII., most of these exemptions from tithes would have fallen with them, and the lands become titheable again, had they not been supported and upheld by the statute 31 Hen. VIII. c. 13, which enacts that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes in as large and ample a manner as the abbeyes themselves formerly held them. And from this original have sprung all the lands which, being in lay hands, do at present claim to be tithe-free; for if a man can show his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before mentioned, this is now a good exemption.]

Again, all persons, spiritual or lay, may claim an exemption from tithes, either partial or total, by reason of

(i) *Blinco v. Marston*, Cro. Eliz. 479; *Wright v. Wright*, *ibid.* 511; Sav. 3; *Moore*, 910, S. C.

(l) *Wright v. Gerrard*, Hob. 309.

(m) *Bishop of Winchester's case*, 2 Rep. 44; *Seld. Tithes*, c. 13, s. 2.

(k) *Blinco v. Marston*, *ubi sup.*

a *real composition*; which is an agreement [made between the owner of the lands and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall, for the future, be discharged from payment of tithes by reason of some land or other real recompence given to the parson, in lieu and satisfaction thereof⁽ⁿ⁾. This was permitted by law, because it was supposed that the clergy would be no losers by such composition, since the consent of the ordinary, whose duty it is to take care of the church in general; and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual; and hence have arisen all such compositions as exist at this day, by force of the common law. But experience showing that even this caution was ineffectual, and the possessions of the church being by this and other means every day diminished, the disabling statute 13 Eliz. c. 10, was made, which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches other than for three lives, or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 Eliz. is] in general [good for any longer term than three lives or twenty-one years, though made by consent of the patron and ordinary.] But by 2 & 3 Will. IV. c. 100, s. 2, it is enacted, that every composition for tithes, which had then been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron and incumbent, were parties, and which had not been since set aside or departed from, shall be valid in law.

Moreover, all persons, spiritual or lay, may claim a partial exemption from tithes by *custom* (*o*); which is where, by immemorial usage, a particular manner of tithing has been allowed, different from the payment of one-tenth of the annual increase. [And this immemorial usage is

(n) 2 Inst. 490; 13 Rep. 40.

(o) As to custom, vide sup. vol. ii. p. 34.

[binding upon all parties, as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made.] Such customary mode of tithing is called a *modus decimandi*, or more simply, a *modus*. [It is sometimes a pecuniary compensation; as twopence per acre for the tithe of land: sometimes it is a compensation in work and labour; as that the parson shall have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him: sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity; as a couple of fowls in lieu of tithe eggs: and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

To make a good and sufficient *modus*, the following rules must be observed: 1. It must be *certain* and *invariable* (*p*); for payment of different sums will prove it to be no *modus*, that is, no original real composition, because that must have been one and the same, from its first original to the present time. 2. The thing given in lieu of tithes must be beneficial to the *parson*, and not for the emolument of third persons only (*q*); thus a *modus* to repair the *church*, in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson (*r*). 3. It must be something *different* from the thing compounded for (*s*). One load of hay in lieu of *all* tithe hay is no good *modus*, for no parson would *bonâ fide* make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another (*t*). Thus a *modus* of one penny for every

(*p*) *Towerson v. Winget*, 1 Keb. 602.

(*q*) 1 Rol. Abr. 649.

(*r*) *Vide sup.* p. 114.

(*s*) *Sheppard v. Penrose*, 1 Lev. 179.

(*t*) *Grysmen v. Lewis*, Cro. Eliz.

446; *Startupp v. Dodderidge*, Salk. 657.

[*milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle; for tithe is of common right due for both, and therefore a *modus* for one shall never be a discharge for the other. 5. The recompence must be in its nature as durable as the tithes discharged by it,—that is, an inheritance certain (*u*); and therefore a *modus* that every *inhabitant* of a house shall pay four pence a year in lieu of the owner's tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompence will be lost. 6. The *modus* must not be too large; which is called a *rank* *modus*; as if the real value of the tithes be 60*l. per annum*, and a *modus* is suggested of 40*l.*, this *modus* will not be established, though one of 40*s.* might have been valid (*v*). Indeed, properly speaking, the doctrine of *rankness* in a *modus* is a mere rule of evidence drawn from the improbability of the fact, rather than a rule of law (*w*). For in these cases of customary *moduses*, it is supposed that an original real composition was antiently made, which being lost by length of time, the immemorial usage is admitted as evidence to show that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago ascertained by the law, to commence from the beginning of the reign of Richard I. (*x*); and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present. Wherefore as this real composition is supposed to have been an equitable contract, or the full value of the tithes at the time of making it, if the *modus* set up is so *rank* and large as that it beyond dispute exceeds the value of the tithes in the time of Richard I., this *modus* is (in point of evidence) *felo de se*, and destroys itself. For as it would be destroyed by any direct evidence to prove its non-existence

(*u*) 2 P. Wms. 462.

C. B.

(*v*) 11 Mod. 60.(*x*) 2 Inst. 238, 239; vide *supra*,(*w*) *Pyke v. Dowling*, H. 19 Geo. 3, vol. ii. p. 35.

[at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original.]

Lastly. All persons, spiritual or lay, may, in certain cases, claim exemption from tithes, in respect of *long usage*; that is, such usage as can be shown to have lasted for a certain period of time, even though it may have fallen short of immemorial duration. This sort of exemption is given by a late statute, and it may either be by way of *modus*, (in which case the discharge is partial only,) or may be founded on an usage to pay no tithe whatever. But in either case its principle is new; for the common law recognized no *modus* that had not existed *immemorially*; and allowed no *total* discharge from tithes by force of any custom or prescription whatever, except in the case of spiritual persons before mentioned; maintaining inviolably the maxim, that, [in lay hands, *modus de non decimando non valet* (y).]

The statute above referred to, is the 2 & 3 Will. IV. c. 100 (z), whereby it is provided, that when tithe is demanded by any lay person, not being a corporation sole, or by any corporation aggregate, any *modus* or discharge set up in answer to such claim, shall be deemed valid, upon evidence showing an usage in support of it, for thirty years, unless it can be met by evidence that such usage has been by virtue of some agreement in writing, or that before the thirty years the usage was different; and a *modus* or discharge shall in such case be deemed absolutely valid, upon evidence showing an usage for as much as sixty years in support of it, unless it be proved to have been by virtue of some agreement in writing. And farther, that when tithe is demanded by any bishop, parson, or other corporation sole, any claim of *modus* or discharge shall be valid and indefeasible upon evidence of usage during the whole time that two persons in suc-

(y) *Wright v. Wright*, Cro. Eliz. 511.

Mattingley, 5 Mee. & W. 302; and the act for its amendment, 4 & 5

(z) As to this act, see *Thorpe v.*

Will. 4, c. 83.

cession shall have held the benefice, and for three years after the institution of a third incumbent, unless it shall be proved that such usage was by some agreement in writing; provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such usage not only during the whole of such time, but also during such farther period as shall, with such time, be sufficient to make up the full period of sixty years, and the farther period of three years aforesaid.

Such, in a general point of view is the state of the law with respect to tithes. But, as already remarked, a system is now in progress for commutation of this species of property into rent-charge; and to this subject it is now time to call the reader's attention.

The institution of tithes, though venerable from its scriptural origin and its antiquity, and though entitled, so far as the principle of making a competent provision for the ministers of religion is concerned, to universal approbation; is nevertheless, in its specific form, odious to the people, and unsatisfactory to the political economist. A tax, consisting of a fixed proportion of the gross produce, is open to this objection, that it takes advantage of increased fertility, while it makes no allowance for increased expenditure, and thus tends to check the spirit of agricultural improvement. It is obvious, too, that the produce of the soil cannot be collected in kind, without much waste and expense to the tithe-owner, nor without the danger of engendering animosities between him and his flock. It is, however, on the other hand, of not less manifest importance to the church, that the legal provision for its members should be such as to secure to them, upon some steady basis, a competent portion of the necessities of life, and to make them independent of any fluctuations in the value of money. It is therefore with great wisdom that parliament has lately consented to the adoption of a plan for commuting the tithes of every parish into a rent-charge,

the amount of which is to be adjusted annually, according to the average price of corn.

This measure has been carried into effect by the Tithe Commutation Act, 6 & 7 Will. IV. c. 71, and the various acts since passed for its amendment (*a*). They establish a board of commissioners, under the title of "The Tithe Commissioners for England and Wales" (*b*); and provide (in general) that the commutation may be effected in two ways, either by a voluntary parochial agreement, provided it be entered into by a certain proportion of the parties interested (*c*), and confirmed by the commissioners (*d*); or by the compulsory award of the commissioners; for which latter purpose they are required to take, as the basis of the commutation (but with power to a certain extent, and in certain cases, to depart from it), the clear average value of the tithes of the parish, or of the composition payable for the same, where they have been compounded for, for the period of seven years ending Christmas, 1835 (*e*). The value so voluntarily agreed upon, or awarded by the commissioners, (as the case may be,) is to be considered as the amount of the total rent-charge to be paid in respect of the tithes in that parish (*f*), and to be afterwards apportioned among the lands of the parish, having regard to their average titheable produce and productive quality (*g*); and after the apportionment shall have been confirmed, such lands are to be absolutely discharged from the payment of all tithes, and instead thereof shall be subject to their portion of the rent-charge, which shall be thenceforth payable to the former tithe-owner, by two half-yearly payments (*h*). The amount of these payments is to fluctuate according to the price of corn; and the machinery for that

(*a*) 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54. The following are some of the cases which have arisen upon the construction of the Tithe Commutation Act: *Barker v. The Tithe Commissioners*, 9 Meë & W. 130; *In re Tithe Commissioners*, 1 Dowl. N.S. 810; *Fisher*

v. Berrell, *ibid.* 565.

(*b*) 6 & 7 Will. 4, c. 71, s. 2.

(*c*) Sect. 17.

(*d*) Sect. 27.

(*e*) Sect. 37.

(*f*) Sect. 50.

(*g*) Sects. 33, 54.

(*h*) Sect. 67.

purpose is as follows. It is provided that immediately after the passing of the act, and also in January every year, an advertisement shall be inserted, by authority, in the London Gazette, stating the average price of wheat, barley, and oats, for seven years ending on Thursday before Christmas then next preceding (*i*); and that every rent-charge shall be deemed of the value of so many bushels of wheat, barley, and oats, in equal quantities, as the same would have been competent to purchase according to the prices inserted in the first advertisement (*k*); and that after every first of January it shall vary, so as always to consist of the price of the same quantities, according to the advertisement then next preceding (*l*).

The rent-charge created under these acts differs from rent-charges in general, not only in the variableness of its amount, but in another important particular; for in these, not only the land of the party charged, but his person, is usually liable; but as to a tithe rent-charge, it is expressly provided (*m*), that no person whatever shall be personally liable to the payment. The remedy in general where the rent-charge is in arrear for twenty-one days, is only by distress on the land, as in the case of landlord and tenant (*n*); but if it be in arrear for forty days, and there be no sufficient distress, a writ may then be obtained from one of the judges at Westminster, to assess the arrears; after which the owner of the rent-charge may sue out a writ of execution for taking possession of the lands, and holding them till his debt and costs be fully satisfied (*o*). But it is provided that neither the distress nor

(*i*) Sect. 56.

(*k*) Sect. 57.

(*l*) Sect. 67. We may remark here, that unless by special provision to be inserted in some parochial agreement, and specially approved by the commissioners, the acts do not extend to the tithes of *fish*, or to *personal* tithes, other than tithes of *milk*, or to *mineral* tithes, or to payments in lieu of tithes in *London*, or rent-charges in

lieu of tithes under any custom or private act, or any tithes commuted or extinguished under any former act,—sect. 90; 2 & 3 Vict. c. 62, s. 9.

(*m*) 6 & 7 Will. 4, c. 71, s. 67.

(*n*) Sect. 81. When apportioned on lands taken by a railway, distress may be had on the goods of the company wherever situated; 7 & 8 Vict. c. 83, s. 22.

(*o*) Sect. 82.

writ of execution shall be taken out for more than two years' arrears at any one time (*p*). These rent-charges, it may also be remarked, are made subject to all parliamentary, parochial, and other rates and charges, to which the tithes commuted have heretofore been subject (*q*); and such rates and charges are to be assessed in the first instance upon the occupier of the lands; who may, after paying them, deduct the amount from the rent next payable to his landlord, and the landlord may, in his turn, recover that amount from the owner of the rent-charge (*r*). But in some cases lands may obtain an exemption under the commutation acts, from all liability either to tithe or rent-charge. For to the extent of twenty acres in the same parish, land is allowed to be given to the tithe-owner as an equivalent (*s*); and any person seised in possession of an estate in fee simple or fee tail of any tithes or rent-charge, may dispose of the same, so that it shall be merged in the inheritance of the lands charged (*t*).

The commutation acts provide that any person having any interest in any tithes shall have the same claim upon the substituted rent-charge; and that every estate in the rent-charge shall be subject to the same liabilities and incidents, as the like estate in the tithes commuted; and that when any lands were exempted from tithe while in the occupation of the owner, by reason of being glebe, or having been heretofore parcel of the possessions of any privileged order, the same lands shall be in like manner exempted from the payment of the rent-charge, while in the occupation of the owner thereof; and that where by any act of parliament tithes are authorized to be sold, exchanged, or applied in any way, the same powers shall apply to the rent-charge (*u*). It follows, therefore, that

(*p*) Sects. 81, 82.

(*q*) Sect. 69.

(*r*) Sect. 70. As to the assessment, &c. of *property tax* on these rent charges, vide 5 & 6 Vict. c. 35, sched. A. No. IV.

(*s*) Sects. 29, 62, 68; 2 & 3 Vict. c. 62, ss. 19, 20, 21; 5 & 6 Vict.

c. 54, s. 6; et vide *ibid.* sect. 7.

(*t*) 6 & 7 Will. 4. c. 71; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62.

(*u*) 6 & 7 Will. 4, c. 71, s. 71. As to partial exemption, see also 2 & 3 Vict. c. 62, ss. 11, 12; 3 & 4 Vict. c. 15, s. 14.

notwithstanding the new system of commutation the former tithe law will in some respects always retain its importance, and require to be noticed in our law books. But, on the other hand, when that commutation shall have extended to every parish in the realm, many branches of the former law will for all practical purposes be superseded; and in this may be included (among many others which we have thought it allowable to pass by) the important and difficult subjects of *modus* and *total exemption*, of which we have above endeavoured to give some general idea. For it is provided by the commutation acts, that if any question shall arise as to any composition real, *modus*, or exemption from tithe, in respect of any of the lands or produce thereof in any parish, such question shall be definitively settled in the manner therein provided, and due allowance made in the parochial agreement, or award of the commissioners, (as the case may be,) for every *modus* or exemption that shall be so established (x).

II. As to the estates which ecclesiastical persons may have in the several descriptions of property above enumerated, it is to be remarked, that their case differs from that of ordinary proprietors, in several particulars. A dean and chapter always constitute a corporation aggregate, and every bishop, parson, vicar, and the like, a corporation sole; and consequently they take lands and hereditaments when granted in perpetuity, to hold to them and their *successors*, instead of their *heirs* (y). And in connection with this, is the distinction to be found in the books, that if land be granted to a corporation aggregate, they take a fee simple without the word *successors*; but if to a bishop, parson, or the like, then the word *successors*, (except indeed in case of the antient tenure in frankalmoign,)

(x) 6 & 7 Will. 4, c. 71, ss. 21, 24, 44, 45.

(y) 3 Inst. 202; Co. Litt. 300;

Wats. C. L. 372. As to corporations aggregate and sole, vide sup. vol. i. p. 330.

must be added to give him a perpetuity in right of his church. Indeed, the estate of a parson or vicar, even when perpetual as regards his church, is considered for most purposes, as regards himself personally, an estate for life only, with the fee simple in abeyance ; though for other purposes it is said to amount to a fee simple qualified (*z*). But if a bishop or dean, or dean and chapter, have lands in perpetuity in right of their churches, they are always described in law, as seised in their demesne as of fee (*a*). It is also held, that ecclesiastical persons, on account of their corporate character, cannot be seised, as such, in tail, though they may have an estate determinable upon the death of a person without issue (*b*). And for the same reason they cannot in general, (and subject to the large exceptions introduced by modern statutes on this subject (*c*), hold the lands that are granted to them without obtaining a licence of mortmain (*d*).

III. As to the power of alienation which ecclesiastical persons are competent to exercise.

At common law, though an ordinary tenant for life could make no alienation which would bind longer than while he himself lived (an incapacity to which he is still subject), [yet some tenants for life, where the fee simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee simple, such as parsons and vicars, with consent of the patron and ordinary (*e*). So also bishops and deans, and such other sole ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law

(*s*) Co. Litt. 341 d.

(*a*) Wats. C. L. 373.

(*b*) Ibid.

(*c*) 29 Car. 2, c. 8 ; 1 & 2 Will. 4, c. 45 ; 1 & 2 Vict. c. 107, s. 14 ; 3 & 4 Vict. c. 113, s. 76 ; 4 & 5 Vict.

c. 39, s. 26 ; 6 & 7 Vict. c. 37, s. 25, &c.

(*d*) Wats. C. L. 374.

(*e*) Co. Litt. 44 ; Bac. Ab. Leases, (E) ; Vivian v. Blomberg, 3 Bing. N. C. 311.

[requires, have made leases for years or for life, estates in tail or in fee, without any limitation or control. And corporations aggregate might have made what estates they pleased without the confirmation of any other person whatsoever. Whereas now by several statutes this power, where it was unreasonable and might be made an ill use of, is restrained, and where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statutes. We will take a view of them all, in order of time (*f*).

And, first, the *enabling* statute 32 Hen. VIII. c. 28, empowers three manner of persons to make leases to endure for *three lives* or *one and twenty years*, which could not do so before. As, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife in fee simple or fee tail, provided the wife joins in such lease, may bind her and her heirs thereby. And, lastly, all persons seised of an estate of fee simple in right of their churches (which extends not to parsons or vicars) may (without the concurrence of any other person) bind their successors. But then there must be many requisites observed which the statute specifies, otherwise such leases are not binding.] These requisites we had occasion in a former part of the work to specify, when speaking of the alienation of tenants in tail (*g*). We therefore need only remind the reader that the leases must be for three lives or twenty-one years, must be of lands commonly letten for twenty years past, must reserve the rent that for that period has been usually reserved thereon, and must not be made without impeachment of waste (*h*).

(*f*) The account here introduced of the enabling and restraining statutes is from 2 Bla. Com. 318. See also Bac. Abr. tit. *Leases and Terms of Years*, supposed to be from the pen of Chief Baron Gilbert, where this

subject is learnedly and copiously discussed.

(*g*) Vide supra, vol. i. p. 542.

(*h*) One of the requisites (as stated supra, vol. i. p. 542) is, that the lease must be of corporeal hereditaments,

[Next follows in order of time the *disabling* or *restraining* statute 1 Eliz. c. 19 (made entirely for the benefit of the successor), which enacts that all grants by archbishops and bishops (which include even those confirmed by the dean and chapter, the which, however long or unreasonable, were good at common law), other than for the term of twenty-one years or three lives from the making, or without reserving the annual rent, shall be void. But by a saving expressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use or with intent to be granted out again to her favourites, whom she thus gratified without any expense to herself. To prevent which for the future, the statute 1 Jac. I. c. 3, extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

Next comes the statute 13 Eliz. c. 10, explained and enforced by the statutes 14 Eliz. cc. 11 and 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, which extends the restrictions laid by the last-mentioned statute on bishops to] parsons, vicars, and [other inferior corporations, both sole and aggregate.] From laying all which together, and examining the particular provisions of the before-mentioned statutes, [we may collect that] (subject to the relaxations introduced by some recent statutes to be presently noticed) [all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations are restrained from making any grants or leases of their possessions, unless under the following regulations. 1. They must not exceed twenty-one years or three lives from the making;] but may be for a shorter time. [2. They must be of lands commonly letten for twenty years past. 3. The accustomed rent, or more, must be yearly reserved thereon (*h*).

and not such as merely lie in grant;
but as to church leases this is now dis-
penssed with by 5 Geo. 3, c. 17.

(*h*) As to this requisite, see Doe d.
Douglas v. Lock, 2 Ad. & El. 705.

[4. Houses in corporations or market towns may be let for forty years, provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them, and provided the lessee be bound to keep them in repair; and they may also be aliened in fee simple for lands of equal value in recompence. 5. Where there is an old lease in being, no new lease shall in general be made, unless where the old one will expire or shall be surrendered or otherwise ended within three years (i). 6. No lease, by the equity of the statutes, shall be made without impeachment of waste (j).

Concerning these restrictive statutes, there are two observations to be made; first, that they do not by any construction enable any persons to make such leases as they were by common law disabled to make. Therefore a parson or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even *with* the consent of the patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent (k). Secondly, that though leases contrary to these acts are declared void, yet they are good *against the lessor* during his life, if he be a sole corporation, and are also good against an aggregate corporation, so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong (l).

There is yet another restriction with regard to college leases, by statute 18 Eliz. c. 6; which directs that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each

(i) But according to the construction of these statutes, an archbishop or bishop may make a new lease before the expiration of the first, without any such limitation, provided the new lease be confirmed by the dean and chapter. Bac. Abr. Leases (E), rule 3; Co.

Litt. 45.

(j) As to these statutes, see also 39 & 40 Geo. 3, c. 41, by which they are explained and amended.

(k) Co. Litt. 44.

(l) Ibid. 45.

[6s. 8d., or a quarter of malt for every 5s., or that the lessee should pay for the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges on the market day before the rent became due. This is said (*l*) to have been an invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal Secretary of State; who observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new found Indies (which effects were likely to increase to a greater degree), devised this method for upholding the revenues of colleges. Their foresight and penetration has in this respect been very apparent, for though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion is] reversed, and the money arising from corn rents very greatly exceeds the rents reserved in money (*m*).

Such continued to be the state of the law in this matter from the reign of Queen Elizabeth until a recent period; and such it still continues, subject to the following alterations. First, by 6 & 7 Will. IV. c. 20 (*n*), relative to the *renewal* of church leases (*o*), it is provided that no archbishop or bishop, ecclesiastical corporation sole or aggregate, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease of their lands or hereditaments by way of renewal of a lease previously granted for two or more lives, until one or more of the persons for whose lives it was granted shall die; and then only for the surviving life or lives, and such new life or lives as shall serve to make up the number of lives not exceeding three, for which the first lease was granted;

(*l*) Strype's Annals of Eliz.

(*m*) Blackstone states the proportion in his time as "almost double."

(*n*) Explained and amended by 6 & 7 Will. 4, c. 64.

(*o*) For the former state of the law

as to the grant of a new lease before that in being is expired, or, as they are usually termed, *concurrent* leases, vide Bac. Abr. Leases (E), rule 3; Vivian v. Blomberg, 3 Biag. N. C. 311.

that where such previous lease was for forty, thirty, or twenty-one years, the renewed lease shall not be granted until fourteen, ten or seven years of the first term shall have expired respectively; and that where it was for any term of years whatever, no renewal thereof shall be granted for any life or lives: provided, however, that when it shall be certified by such parties as in the act mentioned, that for ten years last before the act, it had been the usual practice (such practice having, in the case of a corporation sole, commenced prior to the time of the person for the time being representing the corporation) to renew such leases for forty, thirty, or twenty-one years at shorter periods than fourteen, ten or seven years respectively, a renewed lease may be granted conformably to such usual practice; and that nothing in the act shall prevent granting a renewed lease by way of exchange of any life or lives in being, for which a lease shall have been granted, in case such exchange shall be approved by such authority as in the act specified; nor prevent a lease from being granted with a view to confirm any title or otherwise for the life or lives of the same person or persons, or the survivors or survivor of them, or for the same term of years, as the lease last granted.

Next, it is provided by 5 & 6 Vict. c. 27 (an act to enable incumbents to demise the lands belonging to their benefices on farming leases), that it shall be lawful for an incumbent, with consent of the patron and bishop, by deed to lease for a term not exceeding fourteen years any part of the glebe lands, or other lands, belonging to the benefice, to take effect in possession and not in reversion; provided that there be a reservation quarterly, of the best rent that can be gotten, that no fine or foregift be taken for the same, that no lessee shall be made punishable for waste, and that the lease shall contain such covenants as to cultivation, management, and other particulars, as the act particularly specifies (*p*). It is also provided that

where covenants are taken for a particularly expensive mode of cultivation, the term may be extended to twenty years; but that before any lease shall be granted, a competent surveyor shall be appointed by the bishop, patron, and incumbent, who shall certify that the lands and buildings are proper to be leased under the provisions of the act, and otherwise report upon the circumstances of the case (*g*); and that no lease shall be valid unless there be reserved out of the same the house of residence and at least ten acres of the land lying within five miles of it, and situate most conveniently for actual occupation (*r*).

Lastly, it is enacted by 5 & 6 Vict. c. 108 (passed to enable ecclesiastical persons to grant long leases for building, repairs, or other improvements), that any ecclesiastical corporation, aggregate or sole, (except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and also, except any ecclesiastical hospital or the master thereof), may with consent of the Ecclesiastical Commissioners for England (to which, where the lessor is incumbent of a benefice, the consent of the patron also must be added), demise, by deed, the corporate lands or houses for any term not exceeding ninety-nine years, to take effect in possession and not in reversion, to any person willing to improve or repair the same; but so as there be reserved the best yearly rent, payable half yearly or oftener, and so as the lease be made without fine or foregift, and contain such covenants as in the act particularly specified. It is also provided that on the grant of such leases, a small rent may be reserved during the six first years, with an increased rent afterwards (*s*); but no such lease is to comprise the usual house of residence, its outbuildings, or pleasure grounds (*t*). The Act also contains a similar power of leasing, but for the term of sixty years only, with respect to watercourses, way leaves, railroads, and other like easements upon or over

(*g*) Sect. 3.

(*r*) Sect. 2.

(*s*) 5 & 6 Vict. c. 108, s. 2.

(*t*) Sect. 9.

the property belonging to such ecclesiastical persons (*u*), and also with respect to their mines, minerals, or quarries (*x*). But it directs that any increase in the annual value of benefices and preferments to be obtained by means of any leases thereby authorized, or a portion of such increase (as the case may be), shall upon the next vacancy thereof be paid over to the ecclesiastical commissioners, to be applied in making additional provision for the cure of souls, according to the statutes in that behalf provided (*y*). The act also provides that, before any lease shall be granted under its authority, a competent surveyor shall be appointed by the ecclesiastical commissioners with consent of the intended lessor, who shall make such report or certificate as to the intended plan as shall be deemed necessary (*z*). Provisions are also contained as to the surrender of existing leases and under leases, for the purpose of granting a new lease under the act (*a*). And it is enacted that no ecclesiastical person or his representatives shall be liable to the successor on account of any *dilapidations* which may occur in houses or buildings, while the same are held under a lease granted by the act for building or repairing purposes (*b*). This act, however, is made without prejudice to any right that ecclesiastical persons have under the former law to grant or lease, whether by renewal or otherwise, save and except that in every lease hereafter granted under the former law, of lands or houses which shall have been previously leased under this act, there shall be always reserved the best improved rent (payable half yearly or oftener) without taking any fine or foregift for the same (*c*).

In addition to the restrictions on alienation which have been mentioned, the object of which is the protection of the successor, ecclesiastical persons (having the cure of

(*u*) Sect. 4.

(*x*) Sect. 6.

(*y*) Sect. 10—15.

(*z*) Sect. 18.

(*a*) Sect. 16, 17.

(*b*) Sect. 19.

(*c*) Sect. 3.

souls) (*d*) are restrained from *charging* their benefices so as to render them liable to the payment of pension or profit thereout, even in their own time; a provision intended for the protection of the incumbents themselves. This is by force of the 13 Eliz. c. 20, a statute that was once repealed by the 43 Geo. III. c. 84, s. 10, but which has been since revived by 57 Geo. III. c. 99 (*e*). Under this statute of Elizabeth, it has been held that an instrument framed as a lease, but amounting in substance and design to a charge, is illegal and void (*f*); and that not only a direct charge, but an agreement to charge a living, falls under the same consideration (*g*).

Having thus endeavoured to explain in some measure the state of the law with respect to the endowments and provisions of the church properly so called (a subject too large and intricate to admit of fuller exposition within the limits of a work like the present), we shall conclude with some notice of certain profits of little comparative importance, which, as forming a part (however trivial) of the revenues of the clergy, ought to be considered in connection with the subject of the chapter. We allude to those fees and dues which go by the name of *surplice fees* (being payable on baptisms, burials, marriages, and the like), and to Easter offerings and mortuaries; all which are mentioned generally in our books by the name of *oblations*; and are of great antiquity. Indeed, it is said that voluntary oblations (from which these probably emanated) once formed, with the produce of such lands as had been voluntarily bestowed, the whole revenue of the church; until in the fourth century it was enriched with tithes (*h*).

(*d*) Bac. Ab. Leases, F.

(*e*) Shaw v. Pritchard, 10 B. & C. 241. The 57 Geo. 3, c. 99, has been itself in turn repealed by 1 & 2 Vict. c. 106, but without affecting the revival of 13 Eliz. c. 20.

(*f*) Shaw v. Pritchard, ubi sup.

(*g*) Alchin v. Hopkins, 1 Bing. N. C. 99. Et vide as to this statute, Saltmarsh v. Hewett, 1 Ad. & El. 812, and the cases there cited.

(*h*) Jac. Law Dict. Oblations; Rennell v. Bish. of Lincoln, 7 Barn. & Cres. 153.

With respect to the surplice fees, it is said that none are due to the minister as of common right, but that they depend upon special custom only (*i*); while as to Easter offerings, on the other hand, it is laid down that they are due of common right, and that at 2*d.* per head (unless it has been usual to pay more), to him who exercises the spiritual function (*k*). However this may be, the liability to pay oblations generally is recognized by the statute law. For by 2 & 3 Edw. VI. c. 13, all who, by the laws and customs of the realm, ought to pay offerings, shall yearly pay them to the parson or vicar of the parish at the four most usual offering days, or otherwise at Easter; and by 7 & 8 Will. III. c. 6, and 53 Geo. III. c. 127, every person shall henceforth pay all offerings, oblations and obventions to the several rectors, vicars, and others to whom they are due; and they are made recoverable before two justices of the peace, where their amount does not exceed 10*l.*, or (where due from Quakers) 50*l.* (*l*). Moreover in new churches and chapels built under the Church Building Acts (of which we shall presently speak more at large), the payment both of fees and offerings to the minister and clerk respectively is specially regulated and secured (*m*).

As to *mortuaries* (on which the learning is more copious), they are stated by Blackstone to be [a sort of ecclesiastical heriots (*n*)], being a customary (*o*) gift claimed by and due to the minister in very many parishes, on the death of his parishioners. They seem originally to have

(*i*) 3 Bl. Com. 90; Com. Dig. Dismes (B. 1.); Burdeaux v. Lancaster, 1 Salk. 332; Andrewes v. Cawthorne, Willes, 536; Littlewood v. Williams, 6 Taunt. 277; Gilbert v. Buzzard, 3 Phill. 360.

(*k*) Com. Dig. Dismes (B. 1); Laurence v. Jones, Bunb. 173; Eger-ton v. Still, Bunb. 128.

(*l*) By the same statutes, and by 5 & 6 Geo. 4, c. 74, and 4 & 5 Vict. c. 36, this is now the only remedy in

cases where the amount does not exceed 10*l.* (or in the case of Quakers 50*l.*), and no matter of title comes in question.

(*m*) 59 Geo. 3, c. 134, s. 11; 1 & 2 Will. 4, c. 38, s. 14.

(*n*) As to heriots, vide *sup.* vol. ii. p. 48. It is to be observed that mortuaries are not the same as burial fees, Willes, 538 (*n*.)

(*o*) None is due of common right; but by custom only. 2 Inst. 491.

[been, like lay heriots, only a voluntary bequest to the church, being intended, (as Lyndewoode informs us, from a constitution of Archbishop Langham,) as a kind of ex-piation and amends to the clergy, for the personal tithes and other ecclesiastical duties which the laity in their life time might have neglected or forgotten to pay. For this purpose, *after* (o) the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary (p). And therefore in the laws of King Canute (q), this mortuary is called soul-scot (ȝaplyceat), or *symbolum animæ* (r).

It was antiently usual in this kingdom to bring the mortuary to church, along with the corpse, when it came to be buried; and thence it is sometimes called a *corse-present*, a term which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry III. we find it riveted into an established custom; insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. *Imprimis autem debet quilibet qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere, et postea, ecclesiam de alia meliori.* But yet this custom was different in different places, *in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secun-*

(o) Co. Litt. 185.

(p) "*Si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiæ suæ sine dolo, fraude, seu contradictione qualibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum; secundum melius animal reservetur, post obitum, pro salute animæ suæ.*"—Provenc. l. 1, tit. 3.

(q) C. 13.

(r) "In pursuance of the same principle," says Blackstone, "by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death, out of his merchandize,

"jewels, and other moveables (*Panormitan. ad Decretal. l. 3, t. 20, c. 32*). So also by a similar policy in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of Christian burial; or, if he died intestate, the relations of the deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament in 1409 redressed this grievance.—*Sp. L. b. 20, c. 41.*"

[*dum, vel tertium melius; et in quibusdam nihil. Et ideo consideranda est consuetudo loci* (s).. This custom still varies in different places, not only as to the mortuary to be paid, but the person to whom it is payable. In Wales, a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese, till abolished upon a recompence given to the bishop by the statute 12 Ann. st. 2, c. 6. And in the archdeaconry of Chester, a custom also prevailed that the bishop, who was also archdeacon, should have at the death of every clergyman dying therein his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring (t). But by statute 28 Geo. II. c. 6, this mortuary is directed to cease, and the act settled upon the bishop an equivalent in its room.]

[The variety of customs with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other, it was thought proper by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries or corse-presents to parsons of any parish shall be taken in the following manner; unless where by custom less or none at all is due, viz. for every person who does not leave goods to the value of ten marks, nothing; for every person who leaves goods to the value of ten marks and under thirty pounds, 3s. 4d.; if above thirty pounds and under forty pounds, 6s. 8d.; if above forty pounds, of what value soever they may be, 10s., and no more. And no mortuary shall, throughout the kingdom, be paid for the death of any *feme covert*, nor for any child, nor for any one of full age that is not a housekeeper, nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.]

(s) Bract. l. 2, c. 26; Flet. l. 2, c. 57.

(t) Hinde v. Bish. of Chester, Cro. Car. 237.

CHAPTER IV.

OF EXTENSIONS OF THE ORIGINAL CHURCH ESTABLISHMENT—AND HEREIN OF CHAPELS—OF NEW CHURCHES AND CHAPELS—AND NEW ECCLESIASTICAL DISTRICTS AND PARISHES.



THE constitution of the church of England, in what regards its regular and proper establishment of prelates, ministers, churches, and endowments, as above explained, is, for the most part, as antient as the common law itself. But since the original foundations of that establishment were laid, and particularly in our own times, various alterations have been introduced, tending greatly to improve and enlarge the venerable edifice—and we shall endeavour to give some account of these in the course of the following chapter.

The spiritual ministrations of the church are mainly intrusted (as may be inferred from the preceding statements) to the parochial clergy—in other words, the rectors, vicars, and perpetual curates of the different parishes of which the realm is composed, with the temporary curates whom they may think fit to employ for their assistance. Each parish contains a church, with a permanent incumbent of one of the three descriptions above enumerated, the parochial division of the kingdom being indeed itself referential to the establishment of churches therein; every district in which a church has happened to be erected and endowed, having received from remote times the denomination of a parish (*a*). These parishes when first founded

(*a*) *Parochia est locus in quo degit populus alienjus ecclesiæ.* Jeffrey's case, 5 Rep. 67 n. As to the formation of parishes and parish churches,

were presumably in general of a size and population proportioned to the establishment of the single church and minister thus respectively provided for them; and the number of them has from a very early period been such as to comprehend almost the entire realm—there being comparatively but very few and scanty portions of territory which have remained extra-parochial.

To the uniformity of this system, the only exception was, that in certain parishes *chapels* were founded, in which divine service, and (in some instances) the rites of sacrament and sepulture, might be lawfully celebrated, in the same manner as in the parochial churches themselves. These chapels were of various descriptions. Some were *private*, being erected for the use only of particular persons of rank, to whom this privilege was conceded by the proper authorities—while others were *public*, and designed for the benefit of particular districts lying within the parochial ambit (*b*). These last were in general founded at some period later than the church itself, and were designed for the accommodation of such of the parishioners as in course of time had begun to fix their residence at a distance from its site; and chapels so circumstanced were described as *chapels of ease*, because built in aid of the original church (*c*). But there were others which seem to have been coeval with, and independent of the church, and to have been designed for the benefit of some particular districts never included within its pale, though locally embraced by the parochial division (*d*). With respect to the chapels of ease (also called *chapels belonging to the mother church* (*e*)) they were either *parochial*, in which both divine worship and the rites of sacrament and sepulture were performed—or *mere* chapels of ease, and designed for divine worship

vide sup. vol. i. p. 108; Seld. Hist.

Tithes, ch. ix. 1—4; Hallam, Mid.

Ag. vol. ii. p. 205.

(*b*) Godolph. Ab. 145; Farnworth
v. Bishop of Chester, 4 B. & C. 568.

(*c*) Wats. C. L. 645; Farnworth

v. Bishop of Chester, ubi sup.

(*d*) Craven v. Sanderson, 7 Ad. &
El. 880.

(*e*) Wats. C. L. ubi sup.

only. But as to chapels of ease of either description these doctrines equally prevailed and are still law—that of common right the nomination to them is in the incumbent, and cannot be taken from him except by agreement between himself, the patron and the ordinary (*f*); and that their establishment in any parish does not of itself deprive the inhabitants accommodated therein of the right of resorting to the church; nor, on the other hand, exempt them from liability to its repairs or any other parochial burthen (*g*).

To the number of chapels thus created in antient times, considerable additions were afterwards made at comparatively modern periods—many new chapels of ease (particularly in towns) having latterly been built and endowed, to meet the demands of a population beginning to overflow; and among these may be particularly noticed a species of recent introduction (*h*), called *proprietary chapels*, so called because they are the property of private persons, who have purchased or erected them with a view to profit or otherwise.

But these casual additions to our regular establishment, though numerous, were not found adequate to the growing exigency of the case; and in 1818 the legislature began to apply itself systematically to the great object of extending the accommodation afforded by the national church, so as to make it more commensurate with the wants of the people. In that year, and during the interval which has since elapsed, a variety of statutes have been passed for this purpose, which are known by the denomination of the Acts for Church-building.

(*f*) *Farnworth v. Bishop of Chester*, ubi sup.; and see *Dixon v. Kershaw*, Amb. 528; *Duke of Portland v. Bingham*, 1 Hagg. 168.

(*g*) *Ball v. Cross*, 1 Salk. 165; see *Dent v. Rob*, 1 You. & C. 1. In chapels another distinction exists, with which it did not seem necessary to incumber the text. Some are

free chapels, so called because not liable to the visitation of the ordinary, as churches and chapels generally are. These free chapels are always of royal foundation, or founded at least by private persons to whom the crown thought fit to grant the privilege. *Wats. C. L.* 645; 1 *Burn, E. L.* 298.
(*h*) *Moysey v. Hilcoat*, 2 Hagg. 30.

By these acts (*i*) the crown was empowered to appoint a body of commissioners, who constitute a body corporate, under the name of “Her Majesty’s Commissioners for Building New Churches,” and whose office, though limited originally to a period of ten years, has been since prolonged (*h*). They are directed to examine into the state of parishes and extra-parochial places in England and Wales, and to ascertain where the accommodation of additional churches or chapels is wanted; and are empowered, out of funds placed at their disposal by parliament, to cause such churches or chapels as they think requisite to be built, or to assist the parishioners, or any persons subscribing for the purpose, with grants or loans of money (*l*). They have also the power, by consent of the bishop and patron, to recommend the division of one parish into several, so far as ecclesiastical purposes are concerned, or to recommend, by consent of the bishop, the division of any parish into separate ecclesiastical districts, called *district parishes*, for all purposes of worship (*m*), and for the celebration of marriages, christenings, churchings, and burials. And such recommendations when made, are to be carried into effect by order in council. They may also, by consent of the bishop, unite parts of contiguous parishes and extra-parochial places into *consolidated chapelries* (*n*); or assign a particular district to any church or chapel already existing; and by consent of the ordinary, patron, incumbent, and lay impropriator (if any), may convert vicarages into rectories. In connection with all these purposes, the acts

(*i*) 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; 5 Geo. 4, c. 103; 7 & 8 Geo. 4, c. 72; 1 & 2 Will. 4, c. 38; 2 & 3 Will. 4, c. 61; 7 Will. 4 & 1 Vict. c. 75; 1 & 2 Vict. c. 107; 3 & 4 Vict. c. 60. Et vide 1 & 2 Vict. c. 106, s. 25, 80, and 2 & 3 Vict. c. 49.

(*h*) 58 Geo. 3, c. 45; 7 & 8 Geo. 4, c. 72; 7 Will. 4 & 1 Vict. c. 75. By the last of these acts it is to con-

tinue for ten years from 20 July, 1838, and thence to the end of the next session of parliament, unless sooner revoked.

(*l*) 58 Geo. 3, c. 45, ss. 9, 13, 14, &c.

(*m*) Ibid. ss. 16, 20, 24; 1 & 2 Vict. c. 107, s. 12.

(*n*) 59 Geo. 3, c. 134, s. 6; 2 & 3 Will. 4, c. 61.

contain a great variety of provisions too numerous and complex for particular notice in this place, and of which we can only say, in general, that they relate to the extent and manner in which parishes can be compelled to contribute to the new accommodations so provided; the patronage of the new churches and chapels; the pews, free sittings, and repairs thereof; the constitution and boundaries of the new districts; the establishment of ministers, churchwardens, and special vestries therein; and many other particulars.

The acts also give power to the churchwardens of any parish, with consent of the vestry, and also of the ordinary, patron, incumbent and lay impropriator (if any), to take down the existing church and rebuild it on the same or another site—and to make rates on the parish to defray the expenses incurred—but only on condition that no dissent be expressed by as much as one-third in value of the landed proprietors, qualified as in the acts mentioned (*o*).

There are also provisions empowering the bishop of any diocese to grant his consent for the building or purchasing of a church or chapel for any parish or extra-parochial place in his diocese, upon the application of twelve substantial householders there, certifying that they are desirous of raising by subscription the sum required, and that there is not at present accommodation for more than one fourth of the inhabitants (*p*); or upon the application of any person or persons belonging to the Church of England who may be willing to subscribe half the money required, jointly with the parishioners of the place who may be willing to raise the remainder by rates (*q*). It is besides enacted, that, in any parish or extra-parochial place, so circumstanced with respect to church accommodation as in the acts particularly described, any person or persons belonging to the Church of England may, by permission of the bishop of the diocese, and upon making

(*o*) 59 Geo. 3, c. 134, s. 40.

(*q*) Ibid, s. 9.

(*p*) 5 Geo. 4, c. 103, s. 5.

such endowment as therein also mentioned, and setting apart a certain proportion of the sittings as free, be at liberty to build or purchase a church or chapel for such parish or place, and obtain for himself, his heirs, or assigns, the right of nominating a minister to the same (*r*). And in all cases whatever the like permission to build or purchase, and the like right of patronage, may be obtained by any person or persons, upon obtaining the sanction of the church commissioners, and their approbation of the endowment proposed, as well as the consent of the bishop (*s*). But previously to any application for leave to build, purchase, or endow a church, whether made to the commissioners and bishop, or to the bishop alone, (as the case may be,) notice of the intention to do so must be served by the proposed founder, upon the patron and incumbent; and the patron, if he thinks fit to enter upon the same undertaking, and to fulfil the same conditions, shall be entitled to a preference (*t*). A preference also is given in certain cases to persons who propose to enlarge an existing church, over those who propose to build a new one (*u*). The acts moreover contain a provision with respect to chapels of ease in parishes of large extent, situate at a considerable distance from the parish church, and having chapelries or districts annexed thereto, that any person may by permission of the bishop, and by consent of the patron and incumbent, endow the same with a competent provision for the minister, and any such chapel shall thenceforth be separated from the parish church, and become a distinct parish for spiritual purposes; and regulation is made by the acts as to the future right of nominating a minister to the same (*x*). The church commissioners may also,

(*r*) 1 & 2 Will. 4, c. 38, s. 2; 1 & 2 Vict. c. 107, ss. 1—6, 11; 2 & 3 Vict. c. 49, s. 12; 3 & 4 Vict. c. 60, s. 2; 3 & 4 Vict. c. 60, ss. 2, 12, 15, 16, &c.

(*s*) 1 & 2 Will. 4, c. 38, s. 5; 1 & 2 Vict. c. 107, ss. 4, 5, 11; 2 & 3 Vict.

c. 49, s. 12; 3 & 4 Vict. c. 60, ss. 2, 9.

(*t*) 1 & 2 Will. 4, c. 38, s. 7.

(*u*) Ibid. s. 8.

(*x*) Ibid. s. 23; 1 & 2 Vict. c. 107, s. 7.

with consent of the bishop and patron, and the vestry of any parish, order that any church or chapel therein shall become the parish church in lieu of the former parish church; and such former parish church shall from thenceforth be deemed to be a district church, or a chapel with or without a district, as the commissioners shall direct. But no such alteration can take place in the time of an existing incumbent, without also procuring his consent as well as that of the other authorities (*y*).

During this course of legislation upon the subject of church-building, the zeal of the nation was also gradually awakened for the improvement of our ecclesiastical establishment in other particulars—and in the year 1835 gave birth to a measure of high importance. This was the issuing of certain royal commissions, directed to consider the state of the several dioceses of England and Wales, with reference to the amount of their revenues and the more equal distribution of episcopal duties, and also to consider the state of the cathedral and collegiate churches in England and Wales, with a view to the suggestion of such measures as may render them most conducive to the efficiency of the established church—and farther, to devise the best mode of providing for the cure of souls, with special reference to the residence of the clergy in their respective benefices.

The persons appointed under these commissions having proceeded to the execution of their duties, presented several reports, containing a variety of recommendations for improvement of our ecclesiastical system; and these were followed by an act of parliament, 6 & 7 Will. IV. c. 77 (*z*),

(*y*) 1 & 2 Vict. c. 107, s. 16; 2 & 3 Vict. c. 49, s. 9.

(*z*) This act was preceded by 5 & 6 Will. 4, c. 30, and 6 & 7 Will. 4, c. 67, the object of which was to suspend the appointment to certain dignities, &c. in order to carry out the recommendations of the commissioners

with regard thereto, and to protect them from lapse, and also to protect their revenues in the interim. These were repealed by 3 & 4 Vict. c. 113, s. 60, except as regards the dioceses of St. Asaph and Bangor. And as to these see 5 & 6 Vict. c. 112, and 6 & 7 Vict. c. 77.

erecting certain prelates and laymen of distinction (whose number has been since enlarged (*a*)) into a body corporate, by the style of "The Ecclesiastical Commissioners for England;" and empowering them to lay before the sovereign in council, such schemes as might be best adapted to carry the aforesaid recommendations into effect. And it was enacted, that when any such scheme should be ratified by an order in council, duly registered in the registry of the diocese, and gazetted, it should have the same effect as if it had formed part of that act.

In pursuance of this provision certain schemes were accordingly prepared, and embodied in orders in council (*b*), which have accordingly acquired the force of parliamentary law; and by which, among other matters of less importance, many alterations are made in the arrangement of dioceses, including the erection of the new see of Ripon—and in order to augment the income of the smaller bishoprics, contribution is required to be made from time to time from the revenues of the larger, without prejudice, however, to the rights of any then existing prelates.

Independently of these measures of improvement, some important enactments, for rendering our church establishment more efficient, were inserted in the statute 1 & 2 Vict. c. 106, to which we have before had occasion to refer for other purposes (*c*). By that act (after repealing certain statutes (*d*) made in reference to the same subject) it is provided (*e*), that on the representation of the bishop of any diocese (or the bishops of two dioceses, as the case may be), that two or more benefices circumstanced as therein described, and being under a certain aggregate value, may, with advantage to the interests of religion, be united into one, the archbishop shall inquire into the circumstances, and if he approve the union, shall, with con-

(*a*) 3 & 4 Vict. c. 113, s. 78.

(*c*) Vide *supra*, p. 84.

(*b*) These orders in council were, up to 24th August, 1838, twenty-three in number. Rogers, Ec. L. 368.

(*d*) 37 Hen. 8, c. 21; and 17 Car. 2, c. 3.

(*e*) Sect. 16.

sent of the patron (or patrons), and provided no cause, after public notice, be shown to the contrary, certify such inquiry, and consent to her majesty in council ; and there-upon her majesty in council may make an order for uniting such benefices, for ecclesiastical purposes, into one, and regulate the course and succession in which the patrons (if more than one) shall present (*f*). On the other hand, where from the increase of population, or other circumstances, a representation is made by a bishop or two bishops (as the case may be), that two or more benefices which have been united into one may, with advantage to the interests of religion, be separated, her majesty in council is by the same act (*g*) empowered, after the same course of proceedings as above described shall have been observed on the part of the archbishop, (and even without consent of the patron or patrons unless the union had lasted for more than sixty years prior to the act,) to issue an order for separating one or more of such benefices from the union, and for declaring the rights of patronage of the several patrons (if more than one) whose interests are affected. The same act farther provides (*h*), that whereas in some instances tithings, hamlets, chapelries, and other places and districts may be separated from the parishes and mother churches to which they belong, with great advantage, and places altogether extra parochial may with advantage be annexed to parishes or districts to which they are contiguous, or be constituted separate parishes for ecclesiastical purposes ; such several changes may in like manner respectively be made by order in council on the previous representation of the bishop of the diocese, if approved by the archbishop, and if the latter certify his approbation to her majesty in council. This enactment, however, is subject to a proviso that where the

(*f*) See also 4 & 5 Vict. c. 39, s. 23, benefices.

allowing exchanges of advowsons by (*g*) Sect. 21.

consent of the ecclesiastical commis- (*h*) Sect. 26. Et Vide 2 & 3 Vict.
sioners, with a view to the union of c. 49, ss. 6, 7, 8.

existing incumbent of the benefice to be affected by such change shall refuse his consent, the order in council shall not come into operation until the next avoidance of such benefice.

This act was followed by the 2 & 3 Vict. c. 30, which recites that there are several benefices in every of which more than one spiritual person is admitted to the cure of souls, and makes provision in such cases for an apportionment, by the bishop of the diocese, of the spiritual duties, if no satisfactory cause is shown why such apportionment should not be made. And also by the 2 & 3 Vict. c. 49, which provides (among other things) that any church or chapel augmented or to be augmented by the governors of Queen Anne's bounty (*i*), and to which any district chapelry has been or may be assigned under the provisions of the Church Building Acts, shall, after such augmentation and assignment, be a perpetual curacy and benefice, and the minister thereof a perpetual curate, with the exclusive cure of souls therein (*k*). And farther, that when by any order of her Majesty in council a separate parish for ecclesiastical purposes is constituted, the same shall, on registration thereof, and with consent in writing of the incumbent, become in like manner a perpetual curacy and benefice, with exclusive cure of souls, independent of the incumbent; and that if the consent of the incumbent is refused, shall become so on the next avoidance of the benefice (*l*). And moreover, that where any church or chapel has been built or purchased, and endowed, and the patronage thereof granted under the Church Building Acts, and where a particular district has been assigned thereto, the minister or perpetual curate thereof shall have exclusive cure of souls, and be independent of the incumbent of the parish church (*m*).

(*i*) As to Queen Anne's bounty, vide *supra*, vol. ii. p. 550; and see 1 Geo. 1, c. 10, which provides that all churches or chapels augmented by the governors of that bounty shall be

permanent cures and benefices, &c.

(*k*) Sect. 2.

(*l*) Sect. 8.

(*m*) Sect. 10.

Some additional recommendations of the commissioners appointed in 1835 were afterwards carried into effect by the statutes 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39 (*n*). These principally relate to cathedral and collegiate churches, and, among a great variety of other arrangements relative to these subjects, provide for the suspension of a large number of canonries (subject, in certain events, to a power of revival, upon condition of their being newly endowed (*o*)), and for the suppression of all sinecure rectories (*p*), except those in the patronage of private persons (*q*), and of certain deaneries (*r*), and for the vesting of the estates and profits of all such preferments, together with the endowments of non-residentiary prebends, and some other dignities and offices, in the Ecclesiastical Commissioners (*s*); and for the consolidation of all the property so vested, with the accruing interest, into a common fund, to be applied (in general, and under such authority as in the acts provided) to make additional provision for the cure of souls, in parishes where such assistance shall be most required (*t*).

The latest, however, and the most decisive advance that has been made towards the great object of putting the church into a state of full efficiency, is to be found in the enactments of the 6 & 7 Vict. c. 37 (*u*). This statute, (which applies to England and Wales, the Isle of Man, Guernsey, Jersey, Alderney, Sark and the Scilly Islands (*v*),) after reciting that it is expedient to make better provision for the spiritual cure of populous parishes, and to render the estates and revenues vested in the Ecclesiastical Commissioners for England, and the funds at the disposal of the

(*n*) See also 6 & 7 Vict. c. 77, intitled "An Act for regulating the Cathedral Churches of Wales."

(*o*) 3 & 4 Vict. c. 113, s. 20.

(*p*) Ibid. ss. 48, 54; 4 & 5 Vict. c. 39, s. 17; and vide sup. p. 76.

(*q*) As to these also provision is made for suppressing them, with the concurrence of the patrons.

(*r*) 3 & 4 Vict. c. 113, ss. 21, 51; 4 & 5 Vict. c. 39, s. 6.

(*s*) 3 & 4 Vict. c. 113, ss. 49, 51; 4 & 5 Vict. c. 39, ss. 6, 7.

(*t*) 3 & 4 Vict. c. 113, s. 67.

(*u*) Amended by 7 & 8 Vict. c. 94.

(*v*) Sect. 26.

governors of Queen Anne's bounty, applicable immediately to such purpose, enables the former to borrow from the latter, the capital sum of 600,000*l.* three *per cent.* reduced bank annuities; which capital may be afterwards increased by similar loans, if required. And all monies accruing to the said commissioners by reason of the suspension of canonries under the Cathedral Acts of 3 & 4 Vict. and 4 & 5 Vict. above referred to, together with all the lands and hereditaments thereby vested in them, are charged by way of security for the repayment of such loans (*x*). The statute in question then proceeds farther to recite, that there are divers parishes, chapelries, and districts of great extent, and containing a large population, wherein the provision for worship and pastoral superintendence is insufficient; and enacts, that if at any time it shall be made to appear to the Ecclesiastical Commissioners, that it would promote the interests of religion that any part of such parishes, chapelries, or districts, or any extra-parochial places, should be constituted a separate district for ecclesiastical purposes, (the same not containing any consecrated church or chapel in use for divine worship,) it shall be lawful by the authority in the Cathedral Acts provided, (that is to say, a scheme prepared by the Ecclesiastical Commissioners, and an order issued by her majesty in council, ratifying such scheme,) and with consent of the bishop of the diocese under his hand and seal, to set out such district accordingly by metes and bounds, and to fix and declare its name (*y*). The scheme, however, is to be first laid before the incumbent and patron, so as to give them an opportunity of making such remarks or objections as may occur (*z*).

Upon the district being thus constituted, a minister is to be nominated thereto, with an income of not less than 100*l. per annum* (*a*); and the right of nomination of such

(*x*) Sect. 4.(*z*) Ibid.(*y*) Sect. 9.(*a*) Ibid.

minister may be granted to any ecclesiastical corporation, or any of the universities of Cambridge, Oxford, or Durham, or any of their colleges, or to any private person, or their nominees, upon condition of their contributing to the permanent endowment of such minister, or towards providing a church or chapel for the district, in such proportion and manner as shall be approved by the like authority (*b*); but until the patronage shall be so granted, it shall belong to her majesty and the bishop of the diocese alternately (*c*). The funds placed by this act, and the Cathedral Acts, in the hands of the Ecclesiastical Commissioners, are also to be made available for the purpose of endowing or augmenting the income of the ministers of the new districts to such an amount, and in such proportion and manner, as the same authority may deem expedient (*d*). And the commissioners for building new churches are also authorized to apply their funds to the erection of any new church or chapel under this act (*e*); and in order farther to facilitate its objects, the Ecclesiastical Commissioners and the new ministers to be appointed under the same, may, notwithstanding the Statute of Mortmain, take any grants of real or personal property without licence from the crown (*f*).

At any time after the constitution of such district, and while it is still unprovided with a church, the bishop is also empowered to license any building within the same for performance of divine service (*g*); and may, either after such building is procured or before, license the minister to perform any pastoral duties (with the exception only of burials and marriages) in such district; and the minister so licensed shall be considered as having to that extent the cure of souls within the district, and that independently of the incumbent of the parish church (*h*); and

(*b*) Sect. 20.(*c*) Sect. 21.(*d*) Sect. 7, 19.(*e*) Sect. 24.(*f*) Sects. 22, 12.(*g*) Sect. 13.(*h*) Sect. 11.

shall be a body corporate, with perpetual succession, by the style of the *minister* of such district. But after a church or chapel shall have been built or purchased for the district, approved by the commissioners by an instrument under their common seal, and duly consecrated, the district shall immediately, upon such consecration, become a new *parish* for ecclesiastical purposes, and shall be known by the name of the new parish of —, instead of the district of —; and it shall become lawful to solemnize marriages, baptisms, churchings, and burials therein (*i*); and the minister, having been first duly licensed by the bishop to such new parish, shall thereupon *ipso facto* become perpetual curate thereof, and shall be endowed with an income of not less than 150*l. per annum* (*k*); and the new parish and church shall be deemed to be a perpetual curacy and a benefice with cure of souls to all intents and purposes; and two fit persons, being members of the Church of England, shall be annually chosen by the perpetual curate and inhabitants of the new parish, as churchwardens; and be charged with all the ordinary duties of churchwardens in ecclesiastical matters, but not with any duties as overseers of the poor (*l*).

It is farther provided, that until parliament shall otherwise determine, nothing in the act contained shall affect any right or liability, ecclesiastical or civil, of any parish, chapelry, or district, except as therein expressly provided (*m*); and by way of compensation to the incumbents of mother churches, whose fees or emoluments shall have been diminished by the constitution of new districts or parishes, an annual sum may, by the proper authority, be allowed out of the fund in the hands of the ecclesiastical commissioners (*n*). There is also an enactment that so much of a repealed act (17 Car. II. c. 3) shall be re-

(*i*) Sect. 15.(*m*) Sect. 18.(*k*) Sect. 9.(*n*) Sect. 19.(*l*) Sect. 17.

vived, as enables any impropiator or owner of tithes to annex the same or any part thereof unto the parsonage, vicarage, or curacy of the parish church or chapel where the same lie or arise, or to settle the same in trust for the benefit of such parsonage, vicarage, or curacy, and authorizes parsons, vicars, or incumbents, whose emoluments are under 100*l. per annum* (clear of charges), to receive lands, tithes, or other hereditaments, without licence of mortmain (o).

(o) Sect. 25.

PART III.

OF THE SOCIAL ECONOMY OF THE REALM.

IN our examination of public rights we have now taken a distributive view of those which concern the relation between persons in authority, and persons subject to authority; and have thus been led to treat successively of the *civil government* and of the *church*. But there are many other institutions which belong, equally with these, to the division of public rights, as relating immediately to the community at large, or to large classes of it, and not merely to the individual; and which yet, as having no connection with the subject of government, whether civil or ecclesiastical, have hitherto found no proper place in our disquisitions. In conformity with the division laid down at the outset of the book (*a*), these may be designated without impropriety, it is conceived, (though perhaps without sufficient authority,) as the laws of *social economy*—and the following Part will be devoted to the examination of them under their principal heads.

(*a*) Vide sup. vol. ii. p. 346.

CHAPTER I.

OF THE LAWS RELATING TO CORPORATIONS (*a*).

THE principle of social institutions, called bodies corporate (*corpora corporata*) or corporations, has already been in some measure explained; and we have seen that they are artificial persons endowed with the legal capacity of perpetual succession (*b*).

Of these [there is a great variety, subsisting for the advancement of religion, of learning, or of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations let us consider the case of a college in any of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed pray, study, and perform scholastic exercises

(*a*) In law treatises it has been usual to treat of corporations at an earlier stage; and there is some convenience in this course, because there are branches of the law which cannot be discussed without supposing an acquaintance, to a certain extent, with the law of corporations. Blackstone has accordingly inserted them in his first volume, prior to any consideration of the laws of property; a position, it is conceived, which is liable to much objection. But the arrangement adopted for the present work necessarily assigns

the subject to the place it occupies in the text: these institutions being incident to the division of public rights, but having no immediate connection with church or state. And no inconvenience appears likely to attend our method in this respect, as the nature of corporations has already been explained in anticipation, so far as appeared necessary for the information of the student at the time: vide sup. vol. i. pp. 330, 422, 439.

(*b*) Vol. i. p. 330.

[together so long as they could agree to do so ; but they could neither frame nor receive any laws or rules of their conduct—none at least which would have any binding force, for want of a coercive power to create a sufficient legal obligation. Neither could they be capable of retaining any privileges or immunities, for if such privileges be attached, which of all this unconnected assembly has the right or ability to defend them ? And when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students equally unconnected as themselves ?

So also with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other person for the same purposes, but by endless conveyances from one to the other as often as the hands are changed.

But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law ; as one person they have one will, which is collected from the sense of the majority of the individuals : this one will may establish rules and orders for the regulation of the whole (which are a sort of municipal laws of this little republic), or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws.] Again, [the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successors. For all the individual members that have existed from the foundation to the present time, or that shall ever after exist, are but one person in law, a person that never dies : in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa ; who, finding upon

[his accession the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law (c), in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together. They were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation—particularly with regard to sole corporations consisting of one person only—of which the Roman lawyers had no notion, their maxim being that *tres faciunt collegium* (d); though they held that if a corporation originally consisting of three persons be reduced to one, *si universitas ad unum redit*, it may still subsist as a corporation, *et stet nomen universitatis* (e).

Before we proceed to treat of the sub-incidents of corporations as regarded by the law of England, let us first take a view of the several sorts of them—and then we shall be better enabled to apprehend their respective qualities. The first division of corporations is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members so as to continue for ever—of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors in some particular station, who are incorporated by law in order to give them some legal capacities and advantages, particularly that of

(c) Ff. 1. 3, 1. 4, *per tot.*

(e) Ff. 3, 4, 7.

(d) Ff. 50, 16, 8, 9.

[perpetuity, which in their natural persons they could not have had. In this sense the sovereign is a sole corporation (*f*); so is a bishop; so are some deans distinct from their several chapters; and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of a parson of a church. At the original endowment of parish churches the freehold of the church, the church-yard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the parson by the bounty of the donor, as a temporal recompence to him for his spiritual care of the inhabitants, and with intent that the same emolument should ever afterwards continue as a recompence for the same care. But how was this to be effected? the freehold was vested in the parson; and if we suppose it vested in his natural capacity, on his death it might descend to his heirs, and would be liable to his debts and incumbrances; or at least the heir might be compellable at some trouble and expense to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die any more than the sovereign—by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor; for the present incumbent and his predecessor who lived eight centuries ago, are in law one and the same person; and what was given to the one was given to the other also.

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members are entirely spiritual persons,] and incorporated as such,—[such as bishops; certain deans; parsons and vicars, which are sole corporations; deans and chapters; and formerly prior and convent, abbot and monks, and the like bodies aggregate. These are erected for the furtherance of religion and perpetuating the rights of the church.

[Lay corporations are of two sorts, *civil* and *eleemosynary*. The *civil* are such as are erected for a variety of temporal purposes. The sovereign, for instance, is made a corporation to prevent in general the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possessions of the crown entire. For immediately upon the demise of a sovereign, his heir is, as we have formerly seen (*g*), in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, and the like ;] and these are now commonly denominated municipal corporations, of which we shall have occasion to speak more at large before the conclusion of this chapter ; others [for the advancement and regulation of manufactures and commerce, as the trading companies of London and other towns (*h*), and others for the better carrying on of divers special purposes,—as] the Colleges of Physicians and Surgeons, [for the improvement of the medical science—the Royal Society, for the advancement of natural knowledge,—and the Society of Antiquaries, for promoting the study of antiquities. And among these the general corporate bodies

(*g*) Vide *supra*, vol. ii. p. 499.

(*h*) By 7 Geo. 3, c. 48 (reciting that by divers acts of parliament and royal charters founded thereupon, certain public companies or corporations have been instituted for the purpose of carrying on particular trades or dealings with joint stocks, and the management of their affairs is vested in general courts composed of the members at large, in which courts every member of the company possessed of the necessary amount of stock is qualified to vote), it is enacted that no member shall be qualified to vote in respect of any stock until he shall have been possessed thereof six calendar months,

unless the same was acquired by bequest, marriage, succession, &c. Also that no declaration of a dividend shall be made by any general court other than a half-yearly or quarterly one, at the distance of five calendar months at least from the last declaration of a dividend ; and that no declaration of more than one half-yearly dividend shall be made by one general court ; and that no question for increasing the rate of dividend shall be decided otherwise than by ballot, to be taken at the distance of three entire days at the least from the adjournment of the general court in which such question shall have been proposed.

[of Cambridge and Oxford must be ranked (*i*); for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy; neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries: for these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty.

The *eleemosynary* sort are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor sick and impotent, and all colleges both in our universities and out of them (*k*), which colleges are founded for two purposes; 1. for the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations,] though in some things (*l*) partaking of the nature of ecclesiastical bodies, [are strictly speaking lay and not ecclesiastical, even though composed of ecclesiastical persons (*m*).] And accordingly they are not subject to the jurisdiction of the Ecclesiastical Courts, or to the visitations of the ordinary or diocesan in their spiritual characters (*n*).

[Having thus marshalled the several species of corporations, let us next proceed to consider—I. How corporations in general may be created. II. What are their powers, capacities and incapacities. III. How corporations are visited. And IV. How they may be dissolved.

(*i*) *Rex v. Cambridge Vice-Chancellor*, 3 Burr. 1656.

(*k*) Such as at Eton, Winchester, Maochester, &c.

(*l*) 1 Bl. Com. p. 470.

(*m*) *Philips v. Bury*, 1 Ld. Raym. 6.

(*n*) *Christian's Blackstone*, vol. i. p. 472 (note).

[I. Corporations, by the civil law, seem to have been created by the mere act and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium* (o). It does not appear that the prince's consent was necessary to be actually given to the foundation of them, but merely that the original founders of these voluntary societies, for they were little more than such, should not establish any meetings in opposition to the laws of the state.

But with us in England, the sovereign's consent is absolutely necessary to the erection of any corporation—either impliedly or expressly given.

The crown's *implied* consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence.] [Of this sort are the king himself, all bishops, parsons, vicars, and some others (p), who by common law have been held, as far as our books can show us, to have been corporations *virtute officii*; and this incorporation is so inseparably annexed to their offices that we cannot frame a complete legal idea of any of these persons, but we must also have an idea of a corporation capable to transmit his rights to his successors at the same time. Another method of implication, whereby the crown's consent is presumed, is as to all corporations by *prescription*, such as the city of London and many others (q), which have existed as corporations time whereof the memory of man runneth not to the contrary (r), and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one, and that by the variety of accidents which a length of time may produce, the charter is lost or destroyed.

(o) Ff. 47, 22, 1.

(p) Blackstone enumerates *churchwardens* also. But these are only a *quasi* corporation. See *Smith v. Ad-*

kins, 8 Mee. & W. 362.

(q) 2 Inst. 330.

(r) Vide *supra*, vol. ii. p. 35.

[The methods by which the crown's consent is *expressly* given, are either by act of parliament or charter. By act of parliament (of which the royal assent is an indispensable ingredient) corporations may undoubtedly be created (s):] but it is observable that the authority of parliament as regards their creation has been usually exercised only in connection with the royal prerogative; as when the charter of the College of Physicians 10 Hen. VIII. (t) was afterwards confirmed by the statute 14 & 15 Hen. VIII. c. 5; or when the crown was permitted by statute 5 & 6 W. & M. c. 20, to erect the corporation of the Bank of England with certain powers; or when by the more recent statute of 5 & 6 Will. IV. c. 76, it was enacted, that upon petition of the inhabitant householders of any borough in England or Wales, the king might, by his charter, incorporate such borough according to the provisions of that act.

[All the other methods therefore whereby corporations exist, by common law, by prescription and by act of parliament, are for the most part reducible to this, of the sovereign's letters-patent, or charter of incorporation. This creation may be performed by the words *creamus*, *erigimus*, *fundamus*, *incorporamus*, or the like. Nay, it is held that if the crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (u), this is also sufficient to incorporate and establish them for ever (x).]

[The crown, it is said, may grant to a subject the power

(s) Blackstone remarks that in statute 39 Eliz. c. 5, parliament in fact exercised this power by incorporating hospitals without any charter, and that there have been other similar instances. Vide 1 Bl. Com. 474.

(t) 8 Rep. 114.

(u) *Gild* signified among the Saxons a fraternity, and was derived from the verb *gildan*, to pay, because every man paid his share towards the expenses of the community. Such of these gilds as were commercial, gra-

dually took the shape of our present municipal corporations, whose place of meeting, it may be observed, is still called the *Guild-hall*. Some curious information as to the Anglo-Saxon gilds or clubs will be found in Turner's Hist. Ang. Sax. vol. iii. p. 98, 6th ed.; where mention is made, among other instances, of a guild of the clergy at Canterbury, and a guild of thegns at Cambridge.

(x) 10 Rep. 30; 1 Roll. Ab. 513.

[of erecting corporations (z), though the contrary was formerly held (a); that is, it may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the sovereign that erects, and the subject is but the instrument; for though none but the crown can make a corporation, yet *qui facit per alium, facit per se*. In this manner the Chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it in the erection of several matriculated companies of tradesmen subservient to the students.]

When a corporation is erected, a name is always given to it (b), or supposing none to be actually given, will attach to it by implication; [and by that name alone it must sue and be sued, and do all legal acts, though a very minute variation therein is not material;] and the name is capable of being changed (by competent authority) without affecting the identity or capacity of the corporation in other respects (c). But some name [is the very being of its constitution; and though it is the will of the sovereign that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions (d). The name of incorporation, says Sir E. Coke, is as a proper name or name of baptism, and therefore when a private founder gives his college or hospital a name, he does it only as a god-father, and by that same name the king baptizes the incorporation (e).

II. After a corporation is so formed and named it acquires many powers, rights, capacities and incapacities; which we are next to consider.]

Among them are some which attach both to corpora-

(z) Bro. Ab. tit. Prerog. 53; Vin. Prerog. 88, pl. 76.

(a) Year Book, 2 Hen. 7, 13; et vide per Ld. Kenyon, R. v. Coopers' Company, 7, 548.

(b) Blackstone says a name must

be given (1 Bl. C. p. 475), but it appears by 1 Salk. 191, that a name of incorporation may be implied.

(c) 4 Rep. 87.

(d) Gilb. Hist. C. P. 182.

(e) 10 Rep. 28.

tions sole and aggregate, viz. 1. They may purchase lands and hold to them and their successors (*f*), as natural persons may, to hold to them and their heirs (*g*); though their power of holding lands is subject to the provisions of the statutes of mortmain, of which we have spoken in a former place (*h*). 2. Aggregate corporations, when of the eleemosynary or ecclesiastical, or municipal kind, and corporations sole, are, in general, restrained by statute from alienation of their lands beyond the life of the person who constitutes the corporation sole, or is the head of the corporation aggregate.

But the other incidents of which we speak belong in general to corporations aggregate only: viz. 3. [They may sue or be sued, implead or be impleaded, grant or receive,] and do all other acts [by the corporate name,] as natural persons may by their individual names. 4. And, as a corollary from this, they are amenable to such judgments as shall be given against them in any suit, in respect of the corporate property only, and not so as to fix any liability on the members or corporators individually (*i*). 5. Their acts are to be under their common seal; [for a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse. It therefore acts and speaks only by its common seal. For though the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the incorporation: it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole (*k*).]

(*f*) As to title by succession, see 2 Bl. Com. 430.

(*g*) 10 Rep. 30. The right of a corporation to hold lands in any manner is subject however also, it will be recollected, to the provisions of 9 Geo. 2, c. 36, as to devises to charitable uses, and of the statutes of mortmain, of both of which we have had occasion

to speak.

(*h*) Vid. sup. vol. i. pp. 421, 549, 551.

(*i*) The maxim of the civil law is the same: "*Si quid universitati debetur, singulis non debetur; nec quod debet universitas singuli debent.*"—Ff. p. 3, 4, 7.

(*k*) Dav. 44, 48.

There are some personal acts however as to which convenience has introduced an exception to this rule. Thus a corporation may (through its head) give command to a bailiff to make a distress, and this needs not to be authenticated under the common seal (*l*). 6. They may [make bye-laws or private statutes for the better government of the corporation, which are binding on themselves unless contrary to the laws of the land (*m*),] or contrary to or inconsistent with their charter (*n*), or manifestly unreasonable (*o*). [For as natural reason is given to the natural body for the governing it, so bye-laws or statutes are a sort of political reason to govern the body politic. And this right of making bye-laws, for their own government, not contrary to the law of the land, was allowed by the law of the Twelve Tables at Rome.] And in our law it is held to be a right so much of course, as regards every corporation, that if the charter by which certain persons are incorporated give to a select body out of their whole number, a power to make bye-laws as to certain specified matters, the body at large is nevertheless at liberty to make them with regard to all matters not specified (*p*). Every corporation, too, has a right, as of course, to alter or repeal the bye-laws which itself has made (*q*). 7. It is subject to certain disabilities, which may compendiously be stated as follows (*r*). A corporation [must always appear by attorney, for it cannot appear in

(*l*) Lutw. 1497; 1 Salk. 197.

(*m*) As where a bye-law is made limiting the number of apprentices which each member shall take, which is illegal; *R. v. Cooper's Company*, 7 T. R. 543. No trading company can make laws which may affect the royal prerogative, or the common profit of the people, under penalty of 40*l.*, unless approved by the chancellor, treasurer, and chief-justices or judges in their circuits; and, even if approved, still, if contrary to law, they are void. 19 Hen. 7, c. 7; 11 Rep. 54.

(*n*) *Rex v. Cutbush*, 4 Burr. 2204; *Hoblyn v. Rose*, in error, 2 Bro. P. C. 329; *R. v. Cambridge*, 2 Selw. N. P. 1144.

(*o*) *Carter v. Sanderson*, 5 Bing. 79; *Frame-work Knitters v. Green*, 1 Lord Raym. 113; *R. v. York*, 3 B. & A. 770; *Kirk v. Nowill*, 1 T. R. 118.

(*p*) *R. v. Westwood*, 7 Bing. 1; *S. C.* 4 B. & Cress. 781; 4 Bligh, N. S. 213.

(*q*) *R. v. Ashwell*, 12 East, 22.

(*r*) 10 Rep. 32.

[person, being, as Sir E. Coke says, invisible and existing only in intendment and consideration of law. It can neither maintain nor be made defendant to an action of battery or such like personal injuries (*s*), for a corporation can neither beat nor be beaten in its body politic.] But it may maintain an action for breach of contract (*t*), and in some cases may be sued in such an action as defendant (*u*). It is also liable to an action for damages in respect of any tortious acts committed by its agents (*x*), and is even liable, in certain cases, to an indictment, as where it allows a bridge, the repair of which belongs to it by law, to fall into decay (*y*). But, in general, it can be guilty of no crime in its corporate capacity (*z*). [It cannot be executor or administrator, nor perform any personal duties, for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another (*a*), for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison (*b*), for its existence being ideal no man can either apprehend or arrest it;] but it may be proceeded against in a court of law by serving the writ on the mayor or other head officer (*c*), and by executing a distress, where

(*s*) *Doe v. Woodman*, 8 East, 229.

(*t*) *Com. Dig. Franchises (F.)*; *Bac. Abr. Corporation (E. 4)*; *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466; *Mayor of Stafford v. Till*, 4 Bing. 75; *East London Water Works Company v. Bailey*, *ibid.* 283; *Church v. The Imperial Gas-Light and Coke Company*, 6 Ad. & El. 846; *Gibson v. East India Company*, 5 Bing. N. C. 262.

(*u*) *Beverley v. The Lincoln Gas Company*, 6 Ad. & E. 829; *Stark v. Highgate Archway Company*, 5 Taunt. 792; *Hopkins v. Mayor, &c. of Swansea*, 4 Mee. & W. 625; *S. C. in error*, 8 Mee. & W. 901;

Doe d. Parr v. Roe, 1 Ad. & E. N. S. 700.

(*z*) *Maund v. Monmouthshire and Staffordshire Canal Company*, 2 Dowl. N. S. 113.

(*y*) *Lyme Regis v. Henley*, 3 B. & Adol. 77; *R. v. Birmingham and Gloucester Railway Company*, 2 Gale & D. 236.

(*a*) 1 Bl. Com. 476.

(*b*) *Bro. Abr. tit. Feoffment al Uses*, 40; *Bac. on Uses*, 347.

(*c*) *Plowd. 538*; *Attorney-General v. Wilson*, 1 Craig & Phil. 1.

(*c*) 2 Will. 4, c. 39, s. 13. As to taking shares in public companies in execution, see 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82.

it becomes necessary, on its lands and goods (*d*). [Neither can a corporation be excommunicated, for it has no soul, as is gravely observed by Sir E. Coke (*e*); neither is it liable to be summoned into the ecclesiastical courts upon any account, for those courts act only *pro salute animæ* (*f*).] [Aggregate corporations, also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another; neither are they then capable of receiving a grant, for such corporation is incomplete without a head (*g*). But, there may be a corporation aggregate constituted without a head; as the collegiate church of Southwell in Nottinghamshire (*h*), which consists only of prebendaries, and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority. 8. Another incident of corporations is, that the act of the major part is esteemed the act of the whole (*i*). By the civil law, the major part must have consisted of two-thirds of the whole, else no act could be performed (*k*); which perhaps may be one reason why they required three at least to make a corporation. But with us any majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law,—making, very frequently, the unanimous assent of the society to be necessary to any corporate act, which King Henry VIII. found to be a great obstruction to his favourite scheme of obtaining a surrender of the lands of ecclesiastical corporations,—it was therefore enacted by stat. 33 Hen. VIII.

(*d*) Bro. Abr. tit. Corporation. 11; Utlagerie, 72.

(*e*) 10 Rep. 32.

(*f*) 1 Bl. Com. 477.

(*g*) Co. Litt. 263, 264.

(*h*) See as to suspension of canonries or prebends at Southwell, 3 & 4 Vict. c. 113, ss. 18, 36, 41; 4 & 5

Vict. c. 39, s. 12.

(*i*) Bro. Abr. Corporation, 31, 34. The consent of the majority present at the meeting sufficient; Cotton v. Davies, 1 Str. 53; Oldknow v. Wainwright, 2 Burr. 1017.

(*k*) Ff. 3, 4, 3.

[c. 27, “that all private statutes shall be utterly void
“whereby any grant or election made by the head with the
“concurrence of the major part of the body, is liable to be
“obstructed by any one or more being the minority;” but
this statute extends not to any negative or necessary voice
given by the founder to the head of any such society.]

9. It is also incident to corporations to have the power of electing their own members and officers, and thus perpetuating their own succession. When this power is not specially assigned, by the charter which creates a corporation, to a particular portion of the members, it belongs to the major part of the whole members duly assembled for the purpose. It may be delegated, however, by a bye-law, (except in the case of elections of members of parliament in municipal corporations (*l*), to a select body of the corporators, who then become the representatives, as regards this matter, of the whole community (*m*). But though (to prevent confusion) the number of electors may be thus restrained, on the other hand, the number of persons out of whom the election is to be made cannot be diminished by a bye-law (*n*). 10. It is also incident to a corporation aggregate, that they [may take goods and chattels for the benefit of themselves and their successors, as natural persons may for themselves, their executors and administrators; but a sole corporation cannot take goods in his corporate capacity (*o*),] [for such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor, which the law is careful to avoid (*p*).]

With regard to sole corporations, however, [a considerable distinction must be made. For if such sole corporation be the representative of a number of persons, as the

(*l*) See 4 Inst. 48.

(*m*) *Rex v. Spencer*, 3 Burr. 1827.

(*n*) *Ibid.* 1833.

(*o*) Co. Litt. 46.

(*p*) Another reason is elsewhere stated by Blackstone (vol. ii. p. 431),

viz. that if such chattel interest were allowed to descend to a successor, the property itself would be in *abeyance* from the death of the owner till a successor be appointed; which is contrary to the nature of a chattel interest.

[master of a hospital, who is a corporation for the benefit of the poor brethren ; an abbot, or prior, by the old law before the Reformation, who represented the whole convent ; or the dean of some antient cathedral, who stands in the place of, and represents, in his corporate capacity, the chapter ; such sole corporations as these have, in this respect, the same powers as corporations aggregate have, to take personal property or chattels in succession. And, therefore, a bond to such a master, abbot, or dean, and his successors, is good in law ; and the successor shall have the advantage of it, for the benefit of the aggregate society of which he is in law the representative (*q*). Whereas, in the case of sole corporations, which represent no other but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession ; and therefore, if a lease for years be made to the Bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it (*r*).]

All these capacities and incapacities belong as of course to all bodies corporate, and result from the very act of incorporation, without any express mention being made of them in the charter. But none of them in general attach to any bodies of persons unincorporated, however connected they may be in point of social position, or however united by express compact. Thus the inhabitants of a particular parish are not capable, without being incorporated, of holding lands to them and their successors ; though they are capable of receiving a general grant of incorporation, which would enable them to hold such an inheritance (*s*).

(*q*) Dyer, 48 ; Byrd *v.* Wilford, Cro. Eliz. 464.

(*r*) 2 Bl. Com. p. 431, cites Co. Litt. 46.

(*s*) Ashby *v.* White, Lord. Raym. 951 ; S. C. 3 Salk. 18 ; 12 Rep. 121. It is to be observed, however, that there is much property in lands and houses throughout the kingdom which is said popularly to belong to the parish. Such

property has generally been given or devised to charitable purposes connected with the poor of that parish ; but the instrument of gift or will is often lost, and the trustees not known. In some instances too it happens that the property is given or devised not to any individual trustees, but to the overseers, &c. in trust, though these officers are not competent in law to

And though a voluntary society of numerous individuals should unite together by mutual agreement for common purposes, provide a common stock by subscription, and subject themselves to laws of their own creation for the government of their society, yet all this will not entitle them to the privilege of suing or being sued in their social capacity, or protect them from individual liability; but each member, even though a holder only of a particular share, and chargeable only to a limited amount according to the articles of agreement, will be liable nevertheless to be sued in his individual capacity, by all strangers having demands upon the society at large, in the same manner as if he were a member of an ordinary partnership,* to the full amount of those demands (t). Indeed, it has been held that for such a society, or for any persons, to assume to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter, is an invasion of the royal prerogative, and in the nature of a criminal offence at the common law (u). By a late statute, however, 7 Will. IV. & 1 Vict. c. 73, reciting that “divers associations are and may be formed “for trading or other purposes, some of which associations “it would be inexpedient to incorporate by royal charters,

hold to them and their successors. See 9th Poor Law Rep. p. 29. To meet such inconvenience there exist some legislative provisions. See 59 Geo. 3, c. 12, ss. 12, 17, 25; 5 & 6 Will. 4, c. 69, s. 5; 5 & 6 Vict. c. 18.

(t) It must appear, however, that the demand is one for which the society at large is properly answerable, which must depend on its constitution, and the course of dealing out of which the demand arises. As to the liability of members or directors of non-incorporated companies and clubs, see *Attwood v. Small*, 7 B. & C. 390; *Bramah v. Roberts*, 3 Bing. N. C. 963; *Todd v. Emly*, 7 Mee. & W. 427; 8 Mee. & W. 505.

(u) *Duvergier v. Fellowes*, 5 Bing. 248; S.C. in error, 10 B. & C. 826. By the statute 6 Geo. 1, c. 18 (commonly called the Bubble Act), enacted, says Blackstone, “in the year after the infamous South Sea project had beggared half the nation,” it was made highly penal for subscribers to public undertakings to “pretend to act as if “they were corporate bodies,” by making their shares in stock transferable, &c. But this act was repealed by 6 Geo. 4, c. 91, which at the same time remitted such companies to the general prohibition of the common law. See *Duvergier v. Fellowes*, above cited.

“ though it would be expedient to confer on them some of
 “ the privileges of and incident to corporations created by
 “ royal charters, and also to invest such associations, or
 “ some of them, with certain other powers and privileges,”
 her Majesty is empowered by her letters-patent to grant to
 any company or body of persons associated for any trading
 or other purposes whatever (*v*), and to the heirs, executors,
 administrators, and assigns of any such persons, although
 not incorporated by such letters-patent, any privilege or
 privileges which, according to the common law, it would
 be competent to the crown to grant to any such company
 by charter of incorporation. And the letters-patent may
 contain provisions declaring the members individually
 liable in their persons and property for the engagements
 and liabilities of the company, to such extent only as shall
 be limited by such letters-patent. And as regards charters
 of incorporation this act also provides that her Majesty
 may limit the duration of them for a term of years, or any
 other period whatsoever, and may also make the corpora-
 tion thereby formed subject to all the provisions in the act
 contained as to unincorporated companies. Another act,
 also, 7 & 8 Vict. c. 110, has been recently passed with re-
 spect to *Joint Stock Companies*, a term which has been
 used in modern times to signify voluntary societies with
 transferable shares, but which this act defines to mean
 every partnership whereof the capital is divided into shares,
 transferable without the express consent of all the co-
 partners ; and also every such association for insurance of
 lives or property, as in the act specified, or for granting
 annuities on lives ; and also friendly societies making as-
 surances on life to the extent in the act specified ; and also
 every partnership, which at its formation, or by subsequent
 admission, (except any admission subsequent on devolu-
 tion, or any act in law), shall consist of more than twenty-
 five members. As to all such companies other than those
 which are incorporated or privileged to sue or be sued in

(1) As to charters under this act, see *Rutter v. Chapman*, 8 Mees. & W. 1.

the names of their officers or members (*x*), which are established in England for any commercial purpose, or purpose of profit, or purpose of insurance (except banking companies (*y*), schools, and scientific and literary institutions, friendly societies (not insuring as aforesaid), loan societies, and benefit building societies), a particular plan of registration is appointed by this act, provisional upon their first projection, and complete upon their actual formation; and such companies, when completely registered, are to be considered as *incorporated* for a variety of purposes, but so as not in any wise to prevent the liability of the shareholders, if due diligence have been first used to obtain satisfaction out of the corporate property (*z*); and regulations are made as to their constitution, and the management of their affairs. And as to the individual liability of each particular member, it is provided, that it shall last for three years after he shall cease to be a shareholder. By another act of the same session, 7 & 8 Vict. c. 111, such registered companies, and all companies regularly incorporated, and companies privileged under the 7 Will. IV. & 1 Vict. c. 73, and all banking partnerships consisting of more than six persons (*a*), shall be liable in certain cases to a fiat in bankruptcy in their corporate or associated capacity, if established for commercial purposes; and the court acting under such fiat shall inquire into the cause of the company's failure, and report thereon to the Board of Trade, which may recommend her Majesty to revoke the company's charter; and the Attorney-General may also, if the case so require, direct a prosecution of the directors or other officers. The same act, moreover, contains provisions for winding up the concerns of such companies, and compelling contributions as between the members, under the direction of the Court of Chancery.

III. Returning however from this digression, [we pro-

(*x*) 7 & 8 Vict. c. 110, s. 2.

Geo. 4, c. 46, &c.

(*y*) The case of Joint Stock Banking Companies is specially provided for by other acts of parliament, see 7

(*z*) 7 & 8 Vict. c. 110, ss. 25, 66.

(*a*) 7 & 8 Vict. c. 113, s. 48.

[ceed next to inquire how corporations may be *visited*. For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise] in them.

[With regard to all *ecclesiastical corporations*, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the crown, as supreme ordinary, is the visitor of the archbishop or metropolitan: the metropolitan has the charge and coercion of all his suffragan bishops: and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations] (b).

With respect to lay corporations of the eleemosynary kind, [the founder, his heirs, or assigns, are the visitors;] for in a lay incorporation the ordinary cannot visit. Yet [if the sovereign and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it;] for here the royal prerogative prevails. And the founder has also a right to appoint a visitor, and to limit the jurisdiction that he is to possess; and if the heirs of a private founder fail, and no visitor has been appointed by him, the right of visitation devolves in such case upon the crown, and is exercised on behalf of the crown in the Court of Chancery (c).

As to a *civil* lay incorporation it has no visitor, in the sense of the term here intended—but the misbehaviour of all bodies corporate of this class are inquired into and redressed, and their controversies decided, in the Court of Queen's Bench, according to the rules of the common law (d). And accordingly in the case of the College of Physicians, though the king by his letters-patent had subjected that body [to the visitation of four very respectable persons,

(b) See *Re Dean of York*, 2 Adol. 233.

& *E. N. S. I.*

(d) *Per Holt*, *Philips v. Bury, Ltd.*

(c) *R. v. Catherine Hall*, 4 T. R. Raym. 8.

[the Lord Chancellor, the two Chief Justices, and the Chief Baron, though the College had accepted this charter with all possible marks of acquiescence, and had acted under it for more than a century, yet in 1753 the authority of the provisions coming into dispute on an appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued, and as this College was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors, and remitted the appellant, if aggrieved, to his regular remedy in his Majesty's Court of King's Bench.]

Hospitals are eleemosynary corporations. [These were considered by the popish clergy as of mere ecclesiastical jurisdiction; however the laws of the land judged otherwise, and with regard to these institutions it has long been held (*e*), that if the hospital be spiritual, the bishop shall visit—but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained that the ordinary should visit *all* hospitals founded by subjects, though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by 14 Eliz. c. 5, which directs the bishop to visit such hospitals only where no visitor is appointed by the founders thereof; and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still if the founder appoints nobody, the bishop of the diocese must visit (*f*).

Colleges in the Universities] (though not, as before remarked, the universities at large) are also eleemosynary corporations. And [(whatever the common law may now or might formerly judge) were certainly considered by the popish clergy, under whose direction they were, as ecclesiastical, or, at least, as clerical corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many

(*e*) Year Book, 8 Edw. 3, 28; 8 Ass. 29.

(*f*) 2 Inst. 725.

[of our most antient colleges, when the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary, several of which are still preserved in the archives of the respective societies. And in some of the colleges of Oxford, where no special visitor is appointed, the Bishop of Lincoln, in whose diocese Oxford was formerly comprised, has invariably exercised visitorial authority; which can be ascribed to nothing else but his supposed title as ordinary to visit these among other ecclesiastical foundations.]

[But whatever might be formerly the opinion of the clergy, it is now held as established law, that colleges are *lay* corporations, though sometimes totally composed of ecclesiastical persons (*g*), and that where the founder has appointed no other visitor, and his heirs become extinct, the right of visitation belongs to the crown; that is, to the Lord Chancellor sitting as the crown's representative in the Court of Chancery (*h*).]

So much with respect to the persons by whom the different classes of corporations are respectively to be visited. With respect to the nature of a visitor's duties it may be laid down generally, that they are to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes—that in the exercise of these duties he is to be guided by the intentions of the founder, so far as they can be collected from the statutes or from the design of the institution—that as to the course of proceeding he is tied up to no particular forms (*i*),—and that while he keeps within his jurisdiction, [his determinations as visitor are final and examinable in no other court whatsoever (*j*).] [Also it is

(*g*) *Philips v. Bury*, *Ld. Raym.* 8.

(*h*) *Rex v. Catherine Hall*, 4 *T. R.* 233; *Ex parte Wrangham*, 2 *Ves. jun.* 609.

(*i*) *Bishop of Ely v. Bentley*, 2 *Bro. & C.* 220; *R. v. Bishop of Ely*,

2 *T. R.* 290; see *Re Dean of York*, *ubi sup.*

(*j*) *Philips v. Bury*, *Ld. Raym.* 5; *S. C.* 4 *Mod.* 106; *Shaw*, 35, 407; *Salk.* 403; *Carth.* 180; *St. John's College v. Todington*, 1 *Burr.* 200;

[said, that where the founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds these rules, an action lies against him, but it is otherwise where he mistakes in a thing within his power (*k*).]

[IV. We come now in the last place to consider how corporations may be dissolved. Any particular member may be disfranchised or lose his place in the corporation, by acting contrary to the laws of the society or the laws of the land, or he may resign it by his own voluntary act (*l*). But the body politic may also itself be dissolved in several ways—which dissolution is the civil death of the corporation; and in this case their lands and tenements shall revert to the person or his heirs who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved the grantor shall have again the lands, because the cause of the grant faileth (*m*). The grant is indeed only during the life of the corporation, which *may* endure for ever—but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation] aggregate, [either to or from it, are totally extinguished by its dissolution (*n*); for it has no longer a corporate character in which to sue or be sued, and as during its existence the members of it could not recover or be charged with the corporate debts in their natural capacities, so neither can they when it has ceased to exist.]

[A corporation may be dissolved—1. By act of parliament, which is boundless in its operations.] And as to a corporation aggregate—[2. By the natural death of all its members.] 3. By the loss of such an integral part of its members as is necessary, according to the charter, to the validity of corporate elections, for in such cases the

R. v. Bishop of Ely, ubi sup.; R. v. Bishop of Worcester, 4 M. & S. 415.

(*k*) 2 Lutw. 1566.

(*l*) 11 Rep. 98; R. v. Liverpool,

2 Burr. 723; R. v. Harris, 1 B. & Adol. 936.

(*m*) Co. Litt. 13.

(*n*) Edmunds v. Brown, 1 Lev. 237.

corporation has lost the power of continuing its own succession (o). [4. By surrender of its franchises into the hands of the sovereign, which is a kind of suicide. 5. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void (p). And the regular course is to bring an information in the nature of a writ of *quo warranto*, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles and King James the Second, particularly by revoking the charter of the city of London, gave great and just offence; though perhaps in strictness of law, the proceedings in most of the cases that occurred were sufficiently regular; but the judgment against the charter of London was reversed by act of parliament (q) after the Revolution, and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatever.]

We have already remarked, that there is a species of lay corporation, which is erected for the good government of a town. An institution of this kind has latterly been termed a *municipal corporation*; and may be defined generally as a body politic or corporate, established in some town to protect the interests of its inhabitants as such, and the maintenance of order therein, and consisting of the burghesses or freemen, that is, such persons as

(o) See 11 Geo. 1, c. 4, s. 5; R. v. Passmore, 3 T. R. 199; R. v. Miller, 6 T. R. 268; R. v. Morris, 3 East. 213; S. C. 4 East, 17. But by 11 Geo. 1, c. 4, it is provided, that municipal corporations shall not be dissolved by the non-election or void election of the mayor or other chief officer on the day mentioned in the charter, and this is held to extend to

other officers also. The provisions of this statute are expressly extended to elections under the Municipal Reform Act, by 7 Will. 4 & 1 Vict. c. 78, s. 26.

(p) R. v. Ponsonby, 1 Ves. jun. 8.

(q) St. 2 W. & M. c. 8; vide R. v. Amery, 2 T. R. 515; S. C. in error, 4 T. R. 122.

are duly and legally admitted as members of the corporate body.

The earlier history of the incorporation of the English towns (*r*) is involved in some degree of obscurity. What may be stated with certainty, however, is as follows.

First, a diligent examination of our antient historical remains will suffice to establish the point, that even prior to the Norman Conquest there existed, at least, the germ of municipal corporations in this country (*s*); it having been usual for such persons of free condition as were not landowners, to settle in the towns and occupy houses there, as tenants to the crown, or some inferior lord, under the name of burgesses (*t*); to form themselves by licences from the crown, (as many classes of persons did in that age,) into voluntary associations or fraternities, called *guilds* (*u*); to be entitled in their capacity of burgesses to certain property (*v*), and in the same capacity to be exempt

(*r*) A full account of the establishment of the *communities* in Italy, France, Germany, and Spain, is given in Robertson's *Clias.* V. vol. i. p. 33, notes xv., xvi., xvii., xviii. By this account it appears, that in France charters of date as early as A. D. 974 and 1025, are known to have been granted in favour of certain French towns, conferring liberties and privileges upon them; but the communities did not acquire the privilege of municipal government and some other of the more important concessions till the time of Louis VI. about A. D. 1120.

(*s*) Robertson says, that in England the establishment of communities or corporations was posterior to the conquest, "and that the practice was "borrowed from France." He adds, however, "that it is not improbable "that some of the towns in England "were formed into corporations under

"the Saxon kings, and that the charters granted by the kings of the Norman race were not charters of "enfranchisement from a state of "slavery, but a confirmation of privileges which they already enjoyed." And he cites Lord Lyttleton's *Hist. of Hen. 2*, vol. ii. p. 317.

(*t*) Turner's *Hist. Anglo-Sax.* vol. iii. pp. 106, 107; *Domesday Book*, *passim*.

(*u*) *Ibid.* p. 98. As to guilds, vide *sup.* p. 173, n. (*u*). There seems reason to believe, that guilds were always founded by the crown's licence. After the Conquest this was undoubtedly the case. See Madox, *Firma Burgi*, p. 26.

(*v*) This appears from some of the entries in the *Domesday*. Thus in Canterbury, burgesses *de rege* 33 *acras prati in gildam suam*. *Domesday*, p. 2.

from certain burthens, and to be subject to certain liabilities (*w*). It is also clear, that very soon after the conquest, and from thence downwards to the time of Henry VI., or thereabouts, charters were from time to time conceded by the Anglo-Norman kings to the same towns (*x*), and to others, either confirming the former grants, or (as the case might be) conferring new ones; that by such charters the boroughs were frequently demised in fee farm to the burgesses (*y*); and these persons were also authorized to have a *guild merchant* (*z*); to have officers such as mayors, aldermen, bailiffs, and the like, for government of their towns (*a*); to hold courts of their own for administration of justice within the same precinct (*b*); and to enjoy many other liberties and privileges, of which it may be said, in general, that they chiefly consisted of exemptions from arbitrary taxation and from feudal oppressions.

And lastly, we find that from about the reign of Henry VI. to the present day, other charters of a similar character (though varying of course with the change of times, as to the nature of the specific privileges conferred) have been repeatedly granted to the same and to other towns by our different monarchs; but in a form more strictly adapted to the legal idea of an incorporation; these instruments containing an express grant that the mayor, bailiff, (or other officers), and burgesses of the particular towns, should be a "body corporate" by a certain name, and by

(*w*) Domesday, *passim*.

(*x*) The enumeration of the towns particularly noticed in Domesday in reference to their services and customs, will be found in the Introduction to Domesday by Sir H. Ellis, vol. i. p. 191.

(*y*) Madox, *Firma Burgi*, p. 37.

(*z*) Thus Hen. II. grants to the burgesses of Southampton, "*quod habeant et teneant gildam suam et omnes libertates et consuetudines*," &c.; and King John grants to Dunwich *han-*

sam et gildam mercatoriam. Madox, *Firma Burgi*, 27, where see other instances.

(*a*) Madox, *Firma Burgi*, 28, 116, 136, 139.

(*b*) See charter of Rich. I., granting to the burgesses of Colchester, "*quod ipsi ponant de seipsis ballivos quoscunque voluerint et judiciarios ad sumandum placita coronæ nostræ et ad placitandum eadem placita infra burgum suum*." Ibid. 28.

that name have perpetual succession, and be competent to sue and be sued, and the like (c).

Under all these different grants a very large proportion of the different towns of England have successively become incorporated; but until a recent period their constitutions were in many respects defective, and of a nature liable to abuse; and being founded besides on charters granted by different kings at different times, or on the immemorial custom applicable to each particular town, where the charter was lost or silent, were subject to a great and inconvenient variety of structure. To place these important institutions upon a more satisfactory and uniform basis, and to purify their internal economy, it was deemed necessary in the course of the last reign to pass an act "to regulate the municipal corporations in England and Wales" (d).

By this statute 5 & 6 Will. IV. c. 76 (commonly called the Municipal Corporation Act), the corporate towns, or, as they are denominated in this statute, *boroughs* (e) enumerated in the schedules A. and B. annexed thereto, (comprising, with the exception of London and a few other

(c) See the charters of Hen. VI. and Edw. IV., cited *ibid.* Before the reign of Hen. VI. demises in fee farm, or other grants to burgesses, were to hold to them and their "heirs," or sometimes to their "successors or their heirs." *Ibid.* 39.

(d) This act was preceded by the appointment of a commission dated (18 July, 4 Will. 4), "to inquire into the existing state of municipal corporations in England and Wales, and to collect information respecting the defects in their constitution, &c." The first report of the commissioners, dated 30th March, 1835, contained the following statement: "There prevails among the inhabitants of a great majority of the in-

corporated towns, a general, and, in our opinion, a just dissatisfaction with the municipal institutions—a distrust of the self-elected municipal councils, whose powers are subject to no popular control, and whose acts and proceedings being secret are not checked by the influence of public opinion—a distrust of the municipal magistracy, tainting with suspicion the local administration of justice,—a discontent under the burden of local taxation, while revenues are diverted from their legitimate use," &c. p. 49.

(e) The term *borough* is employed in this act in a somewhat novel sense. It seems originally to have signified a town of note or importance, but gene-

places, the whole of those in England and Wales (*f*), are placed under one uniform plan of constitution thereby newly devised. According to this plan the definition of a *burgess* (*g*) in the boroughs comprised in the act (that is, a burgess intitled to such new rights as the act for the first time confers on these boroughs (*h*),) is a male person of full age not an alien, nor having received within the last twelve months parochial relief, or alms, or pension, or charitable allowance from the charitable trustees of the borough, who on the last day of August in any year shall have occupied any house, warehouse, counting-house, or shop within the borough, during that year and the whole of the two preceding years; and during such occupation shall also have been an inhabitant householder within the borough, or within seven miles thereof; and shall during such time have been rated in respect of such premises to all rates for relief of the poor (*i*), and have paid all such rates and all borough rates in respect of the same premises, except those payable for the last six calendar months; and shall be duly enrolled in that year as a burgess on the *burgess roll* (*k*). Which definition however

rally in later times a town sending members to parliament. Vide sup. vol. i. p. 116, note (*i*); Madox, *Firma Burgi*, p. 2. And it is used in that sense in the Reform Act, 2 Will. 4, c. 45, s. 79. In neither of these applications of the word did it necessarily involve the idea of a municipal corporation.

(*f*) The act provides, sect. 136—138, that nothing therein contained shall alter or affect the rights of the universities of Cambridge, Oxford, or Durham, or the jurisdiction over precincts of cathedrals, or the letters-patent granted to the Grammar School at Louth. It also contains several savings as to the dock yards, &c. s. 89, and the Cinque Ports, ss. 108,

134, 135. As to the *boundaries* of the boroughs to which the act applies, and of the wards thereof, vide sects. 7, 8, 39, 41 of 6 & 7 Will. 4, c. 103; 7 Will. 4 & 1 Vict. c. 78, ss. 29, 41.

(*g*) See 5 & 6 Will. 4, c. 76, ss. 9, 13.

(*h*) *Ibid.* and see sects. 2—5. As to burgesses, see farther 6 & 7 Will. 4, c. 104, s. 7; 7 Will. 4 & 1 Vict. c. 78, ss. 4, 5, 6, 7, 8, 9, 24.

(*i*) *R. v. Bridgenorth* (Mayor), 10 Ad. & E. 66; *R. v. Eye* (Mayor), 9 Ad. & E. 670.

(*k*) As to the burgess roll, see *R. v. Hardwich* (Mayor), 8 Ad. & E. 919; and see 5 & 6 Will. 4, c. 76, s. 22. Before this act the title of burgess (or the *freedom*, as it is called) was gene-

is to be understood as subject to the following rule, that when the premises came to the party by descent, marriage, marriage settlement, devise, or promotion to any benefice or office, he shall be entitled to reckon in the occupancy and rating of the former party from whom they were so derived (*m*).

The new municipal constitution farther provides, that in every borough there shall be elected annually a "mayor" (*n*), and periodically a certain number of "aldermen" (*o*), and of "councillors" (*p*), who together shall constitute "the council" (*q*) of the borough (*r*);—that they shall be respectively chosen from among persons on, or entitled to be on, the burgess list, and otherwise qualified as in the act described (*s*);—that the councillors shall be elected by the burgesses (*t*), and the mayor and aldermen

rally acquired by birth, marriage or servitude, that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman. It might also be obtained by gift or purchase. First Report of Commissioners, pp. 18, 19.

(*m*) Sect. 12; 7 Will. 4 & 1 Vict. c. 78, s. 8.

(*n*) Sect. 49. The case of the death, absence, or incapacity of the mayor, is provided for by sect. 36; of the aldermen by 7 Will. 4 & 1 Vict. c. 78, s. 16. By 6 & 7 Will. 4, c. 105, s. 4, the mayor is to hold over till acceptance of office by his successor.

(*o*) Sect. 25.

(*p*) Sect. 25, 31.

(*q*) As to powers of council, see sect. 72, 73; 6 & 7 Will. 4, c. 104, s. 2; 6 & 7 Will. 4, c. 105, s. 8; 7 Will. 4 & 1 Vict. c. 78, s. 45, 46, 47; Staniland v. Hopkins, 9 Mee. & W. 178.

(*r*) Sect. 25.

(*s*) Sect. 28. Vide 6 & 7 Will. 4, c.

104, s. 7. Since the Municipal Act there have been several additional statutes regulating the subject of elections. Vide 6 & 7 Will. 4, c. 105, s. 5; 7 Will. 4 & 1 Vict. c. 78, s. 1, 11, 14, 18, 25, 26; 3 & 4 Vict. c. 47, s. 1; 6 & 7 Vict. c. 89, s. 1, 2, 3, 5. See also 1 & 2 Vict. cc. 5, 15, as to relief of Quakers, Moravians and Separatists.

(*t*) Sect. 29, 30. See *Harding v. Stokes*, 1 Mee. & W. 354; *S. C.* 2 Mee. & W. 233; *R. v. Oxford*, 6 A. & E. 349. It is to be observed that certain boroughs of large population are by the act divided into a certain number of *wards*, (vide sect. 39; 6 & 7 Will. 4, c. 103, s. 3), and it is provided that a certain number of councillors shall be assigned to each ward (sect. 40), and that the burgesses of each ward and none others shall separately elect the number of councillors assigned thereto (sect. 43). Two assessors are also to be separately elected for each ward. (*Ibid.*)

by the council (*u*);—that the council shall meet once a quarter (and oftener if due notice be given), for transaction of the general business of the borough (*v*), and make their decisions according to the majority of members present, (if those present amount to one-third of the whole,) and that the mayor, or other member presiding in his absence, shall have a casting vote (*x*);—that at any meeting at which two-thirds at least of the whole shall attend, the council may make bye-laws for the good rule and government of the borough, for the prevention and suppression of nuisances, and for the imposition of fines on persons in that behalf offending (*y*);—that the burgesses shall annually elect, from among those qualified to be councillors, two auditors and two assessors (*z*); the former to audit the accounts of the borough, the latter to assist in revising the burgess lists (*a*);—and that the council also may appoint a town clerk and a treasurer, (neither of whom is to be a member of the council,) and such other officers as have been usual or shall be necessary, and shall be empowered to fix their salaries (*b*),—and, if the borough have a separate court of quarter sessions, shall also appoint a coroner (*c*) and a clerk of the peace (*d*).

The council also of any borough which is desirous that

(*u*) Sect. 49, 25. As to the election of outgoing alderman to be mayor, vide *R. v. Stanley*, 3 Per. & D. 561. As to the election to the office of alderman, *R. v. Brightwell*, 10 A. & E. 171. As to the re-election of mayor, 3 & 4 Vict. c. 47. As to the disqualification of councillor, &c. in respect of a contract or office of profit, *R. v. York*, 2 Gale & D. 105; and see 5 & 6 Vict. c. 104.

(*v*) Sect. 69.

(*x*) *Ibid.*

(*y*) *Ibid.*

(*z*) Sect. 37, 29.

(*a*) Sect. 93, 18. By 7 Will. 4 & 1 Vict. c. 78, s. 15, the auditors and

assessors are disqualified to be of the council; by s. 17 the assessor may appoint a deputy.

(*b*) Sect. 58. As to town clerk, see *R. v. Simkins*, 5 A. & E. 423; *R. v. Nicholetts*, 5 A. & E. 376; *R. v. Arnold*, 4 A. & E. 657; *Jones v. Carmarthen (Mayor)*, 8 Mee. & W. 685. As to treasurer, see 6 & 7 Vict. c. 89, s. 6.

(*c*) Sect. 62. By 6 & 7 Will. 4, c. 105, s. 6, the coroner may appoint a deputy.

(*d*) Sect. 103. Clerk of the peace may appoint an assistant, 7 Will. 4 & 1 Vict. c. 19.

a separate court of quarter sessions (*e*) should be holden there, may petition the crown for that purpose; and if the application be granted, the crown shall appoint a recorder, who shall be sole judge of such court of quarter sessions, as also of the court of record for civil actions, if there be any, and if it be not regulated by any local act of parliament and no barrister of five years standing sat therein when the act passed (*f*).

To certain boroughs, and to such others as may petition for it, the crown may also grant a commission of the peace, and nominate such persons to be justices as the crown shall think proper (*g*); and the mayor and recorder are respectively justices of the peace *ex officio* (*h*).

It is provided also that generally, and subject to certain exceptions, the council shall not sell or mortgage the land or public stock of the borough, or demise them for more than a certain term (*i*), and that the rents, profits and interest of all corporate property shall be paid to the treasurer, and carried to the account of the borough fund (*k*), which, after discharging debts, shall be applied to the payment of salaries, the expenses connected with the corporate elections, prosecutions, gaols and maintenance of offenders, and other public purposes (*l*),—that the surplus

(*e*) Sect 103. As to court of quarter session, see farther 7 Will. 4 & 1 Vict. c. 19, s. 1; 6 & 7 Will. 4, c. 105, s. 10.

(*f*) Sects. 105, 118. Vide 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, s. 31, et vide 2 & 3 Vict. c. 27. The recorder may appoint a deputy without consent of council, 6 & 7 Vict. c. 89, s. 8. As to the recorder's oath, 6 & 7 Will. 4, c. 105, s. 3.

(*g*) Sect. 98. Vide 7 Will. 4 & 1 Vict. c. 78, ss. 30, 31.

(*h*) Sects. 57, 103.

(*i*) Sects. 94, 95, &c. As to sale of right of nomination to church patronage, &c. see 1 & 2 Vict. c. 31; power

of leasing, 6 & 7 Will. 4, c. 104, s. 2.

(*k*) As to the borough fund, see sect. 92; 6 & 7 Will. 4, c. 104; R. v. Ledgard, 1 A. & E. N. S. 16. As to property held by corporations on charitable or other trusts, see sects. 71—75. As to discharge of debt, see 7 Will. 4 & 1 Vict. c. 78, s. 28.

(*l*) Sect. 92. As to prosecutions, see R. v. Bridgewater (Council), 2 Per. & D. 558; Attorney-General v. Norwich (Mayor), 2 Mylne & C. 406. As to maintenance, R. v. Johnson, 10 A. & E. 740. As to gaols, see 6 & 7 Will. 4, c. 105, s. 1; 7 Will. 4 & 1 Vict. c. 78, s. 37; 5 & 6 Vict. c. 53; 7 & 8 Vict. c. 50; 7 & 8 Vict. c. 93.

(if any) shall be expended for the public benefit of the inhabitants, and the deficiency (if any) made up by a rate (*m*),—and that the accounts shall be at all times open to inspection, and regularly audited and printed for the use of the rate-payers (*n*), and submitted to the Secretary of State, and laid before both Houses of Parliament (*o*).

Such are the principal features of the new municipal corporation scheme, as to which however it is farther to be understood that it distinguishes between the rights newly conferred by the act, and the former rights of the corporators with regard to the corporate property, and as to voting at parliamentary elections; both which former rights are expressly preserved. For it is provided that every inhabitant, and every person admitted a freeman or burgess, and the wife or widow, or son or daughter of any freeman or burgess, and every person married to the daughter of a freeman or burgess, and every apprentice, shall enjoy the same share and benefit of the lands and public stock of the borough, as he might have enjoyed in case the act had not been passed; subject to the limitation however that the total amount to be divided among such persons shall not exceed the surplus which shall remain after payment of the expenses by the act charged upon the borough fund (*p*). And farther, that every person who if the act had not been passed would have enjoyed as a burgess or freeman, or might thereafter have acquired in respect of birth or servitude, the right of voting in the election of members of parliament, shall be entitled to enjoy or acquire such right of voting as fully as he might in that case have done (*q*). It is also enacted that the town clerk of every

(*m*) Ibid. As to levying borough rate and watch rate, 6 & 7 Will. 4, c. 104, s. 5; 7 Will. 4 & 1 Vict. c. 78, s. 29; 7 Will. 4 & 1 Vict. c. 81; 2 & 3 Vict. c. 28; 3 & 4 Vict. c. 28. County rate, 6 & 7 Will. 4, c. 104, s. 4. As to rating corporate property to poor rate, 4 & 5 Vict. c. 48.

(*n*) Sect. 93.

(*o*) 6 & 7 Will. 4, c. 104, s. 10; 7 Will. 4 & 1 Vict. c. 78, ss. 43, 49.

(*p*) Sect. 2.

(*q*) Sect. 4. Vide 7 Will. 4 & 1 Vict. c. 78, s. 27. See also as to the right of voting for boroughs in respect of an occupation to the value of 10*l.*, 2 Will. 4, c. 45, s. 27, sup. vol. ii. p. 385.

borough shall make out a list (to be called *the freeman's roll*) of all persons admitted burgesses or freemen for the purpose of such reserved rights as aforesaid (*r*), as distinguished from the burgesses newly created by the act, and entitled to the rights which it newly confers; who are to be entered (as before explained) on another roll, called the *burgess roll*.

There are some other points of importance, besides these already noticed, on which the act has innovated upon the laws and customs which formerly prevailed in corporate towns. It enacts that no person shall in future be made a burgess or freeman by gift or purchase (*s*); the effect of which is to leave no other title in force, as regards the right to be placed on the freeman's roll, but those of birth, marriage, and servitude as an apprentice (*t*). It abolishes (though with a reservation of the rights of the then existing claimants) the exemptions that had been ordinarily claimed by burgesses, inhabitants, or the like, for such tolls or dues as are levied to the use of the body corporate (*u*). And whereas in divers boroughs a custom had prevailed, and bye-laws had been made, that no person not being free of the borough, or of certain guilds, mysteries, or trading companies therein, should keep a shop for merchandize, or use certain trades or occupations, for gain within the same, the act provides that every person may in future keep any shop, and use every lawful trade and occupation therein, any such custom or bye-laws notwithstanding (*x*).

It remains only to observe, that the several provisions of this act are applicable not only to the boroughs enumerated in the schedules, but to every other (whether

(*r*) Sect. 5.

(*s*) Sect. 3.

(*t*) Sect. 5. As to the right of persons on the freeman's roll to vote for members of parliament, however, it is to be observed, that it belongs to those only who have been admitted by

birth or servitude, as stated in the preceding page; and no longer to those admitted by marriage.

(*u*) Sect. 2. Vide 6 & 7 Will. 4, c. 104, s. 9.

(*x*) Sect. 14.

before incorporated or not) which shall obtain a new charter of incorporation, or petition to the crown for that purpose (*y*) ; and that with respect to every borough falling within the act, the former statutes, charters and usages by which it was governed, so far as consistent with these provisions, are to be considered as still in force, while on the other hand so much of them as is inconsistent with the act, is in express terms repealed (*z*).

(*y*) Sect. 141 ; 7 Will. 4 & 1 Vict. (*z*) Sect. 1.
c. 78, s. 49.

CHAPTER II.

OF THE LAWS RELATING TO THE POOR.

[The poor of England, till the time of Henry VIII., subsisted entirely upon private benevolence, and the charity of well-disposed Christians (*a*). For though it appears by the Mirror (*b*), that by the common law the poor were to be “sustained by parsons, rectors of the church, and the parishioners, so that none of them die for default of sustenance,” yet till the statute 27 Hen. VIII. c. 25, we find no compulsory method chalked out for this purpose; but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the least, (though frequently esteemed quite otherwise,) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But before the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom, and abundance of statutes were made in the reigns of King Henry VIII. and his children for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased.

(*a*) The poor in Ireland had till of late no relief but from private charity. But by 1 & 2 Vict. c. 56, intituled “An Act for the more effectual Relief of the destitute Poor in Ireland,” the

authority of the Poor Law Commissioners was extended to that part of the realm. This act was amended by 2 & 3 Vict. c. 1.

(*b*) Chap. I. sect. 3.

[These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able but not willing to exercise any honest employment. To provide in some measure for both of these, in and about the metropolis, Edward VI. founded three royal hospitals: Christ's and St. Thomas's, for the relief of the impotent, through infancy or sickness; and Bridewell, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large; and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, (which is generally considered as the foundation of the modern poor-law,) overseers of the poor were appointed in every parish.] It is provided by this statute, that the churchwardens of every parish (c) shall be overseers of the poor, and that, besides these, there shall be appointed as overseers in each parish two, three, or four, but not more, of the inhabitants, such last-mentioned overseers to be substantial householders, and to be nominated yearly in Easter week, (or within one month after,) by two justices dwelling near the parish.

[Their office and duty, according to the same statute, were principally these:] first, to provide work for all persons who had no means to maintain themselves, and used no ordinary trade; and, secondly, to raise competent sums for the necessary relief of the lame, impotent, old, blind, and such other being poor and not able to work. [For these joint purposes they were empowered to make and levy rates upon the several inhabitants of the parish by the same act of parliament, which has been farther explained and enforced by several subsequent statutes.]

The act, it will be observed, involved two principles; first, that every poor person should be either relieved, or (what is equivalent) provided with work; next, that this

(c) As to churchwardens and overseers for separate townships, see *R. v. Justices of North Riding of Yorkshire*,

6 A. & E. 863; *R. v. Worcestershire*, 1 W. W. & H. 432; and 7 & 8 Vict. c. 101, ss. 22, 23.

should be done *parochially*, that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes (*d*). It is to be understood however, that the law did not allow paupers to resort for relief indiscriminately to any parish they preferred ; for by certain statutes of date anterior to the 43 Eliz. (*e*) persons unable or unwilling to work, were compellable to remain in the particular parishes where they were *settled*, that is, where they were born, or had made their abode for three years, or (in case of vagabonds) for one year only (*f*). And this was the origin of the law of *settlement*, with which that of *relief* holds a close connection, these being in fact the two main branches of which the poor-law (as established by the act of Elizabeth) consists. Still there was no regulation either prior to that act, or for a long period afterwards, to prevent an able-bodied and industrious pauper from resorting to any parish that he pleased for employment. But soon after the Restoration the more restrictive principle was introduced, of confining to his existing place of settlement every person whatever whose circumstances were such as to make it probable that he would become a charge upon the public ; and new regulations were devised for carrying that principle into full effect. For by stat. 13 & 14 Car. II. c. 12, s. 1, it was provided (in substance) that persons newly coming to settle in any parish, and likely to become chargeable, might be *removed* by the warrant of two justices of the peace on complaint of the parish officers, to the parish where they were last legally settled (*g*). But that act also materially altered the legal idea and definition of settlement, for it abridged the period at which a man becomes settled by residence, to forty

(*d*) As to extra-parochial townships and subdivisions of parishes, vide 13 & 14 Car. 2, c. 12, s. 22.

(*e*) 19 Hen. 7, c. 12 ; 1 Edw. 6, c. 3 ; 3 & 4 Edw. 6, c. 16 ; 14 Eliz. c. 5 ; see also 7 Jac. 1, c. 4, s. 8.

(*f*) 1 Black. Com. 361.

(*g*) In *R. v. Inhabitants of St. James*, in *Bury St. Edmonds*, 10 East, 31, Bayley, J. says, “ that before the “ statute of Car. II. a settlement was “ gained by mere inhabitancy, and the “ statute was passed to prevent this.”

days (*h*); and as it subjected the poor to removal from every place in which they were not settled, it had the farther and indirect effect of attaching to the condition of settlement the quality of a *right*, because that condition gave an exemption from removal. This state of the law led to unforeseen consequences. Persons who were desirous (for any reason) of gaining a settlement right in particular parishes, were soon found to resort to the expedient of intruding into them furtively, with the view of completing their forty days' residence before they should be discovered (*i*). To prevent this, provision was afterwards made that the forty days should be computed only from the period when notice in writing of the party's new abode should be given to the parish officers; such notice being dispensed with only in cases where the residence was attended with certain circumstances of notoriety, such as entering into a yearly service, or an apprenticeship (*k*). At a subsequent period, however, the principle of giving notice was abandoned altogether (*l*), but the circumstances of notoriety remained, and some of them still remain, (as we shall in the course of this chapter explain more particularly,) indispensable accompaniments of the forty days' residence, so that without them no settlement can be gained. Other consequences in the meantime flowed from the principle that settlement was in the nature of an acquired right; for it became established by a series of judicial decisions, that (like other rights) it might be claimed *derivatively*, that is, that the child was entitled to the parent's settlement, and the wife to the husband's (*m*); and this addition completes the outline of the settlement law as it still exists; subject, however, to one very important alteration introduced in the reign of George III. (*n*),

(*h*) 1 Bl. Com. 362; see Jac. 2, c. 17, s. 3.

(*i*) Ibid.

(*k*) Ibid.; and 3 W. & M. c. 11.

(*l*) 35 Geo. 3, c. 101, s. 3.

(*m*) Fort. 313; 1 Nol. 274.

(*n*) 35 Geo. 3, c. 110, s. 1. Even

prior to this act, if a *certificate* were granted by the officers of one parish to the officers of another, that a particular person was legally settled in the former parish, he was entitled by virtue of such certificate to go to reside in the latter, without being lia-

viz., that a man coming to settle in a parish is no longer liable to removal upon the mere *probability* of his becoming chargeable, but it is required that he should have actually become chargeable by receiving or applying for relief; an alteration (it may be observed) which reverts in some measure to the principle of the system as it stood anterior to the statute of Charles II.

The law as to *relief* was stationary to a much later period, though it has latterly undergone fundamental alterations of the greatest importance. Not only the collection of the rate, but the relief of the poor, with all its attendant management, was long left (conformably to the institution of the statute of Elizabeth) to the overseers of the respective parishes. But these officers were found unequal to the proper discharge of the latter duty. In modern times at least, when by the gradual increase of population and of paupers, its services had become more onerous, they were rarely performed to the satisfaction of the public; and various measures were from time to time devised by the legislature for improvement of the practical system. By the statute 22 Geo. III. c. 83 (commonly called Gilbert's Act) (*o*), parishes were authorized by consent of two-third parts in number and value of the owners or occupiers, with the approbation of two justices of the peace, to appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor, and also to enter into voluntary unions with each other for the more convenient accommodation, maintenance and employment of paupers. This was followed by the statute called "The Select Vestry Act," or "Sturges

able to removal, except in the event of becoming actually chargeable; and on the other hand could not, during such residence, acquire a settlement there by any act of his own except by renting a tenement, or executing an annual office; nor could his servant or apprentice. See 8 & 9 Will. 3,

c. 30; 9 & 10 Will. 3, c. 11; 12 Ann. c. 18, s. 2; 3 Geo. 2, c. 29, ss. 8, 9.

(*o*) *Headerson v. Sherborne*, 2 M. & W. 239; *R. v. Poor Law Commissioners, in re Whitechapel Union*, 6 Ad. & E. 49; and see Reports of the Common Law Commissioners.

Bourne's Act," 59 Geo. III. c. 12 (*p*), by which the inhabitants of any parish in vestry assembled were enabled to commit the management of its poor to a committee of the parishioners appointed for that purpose, and called a select vestry (*q*), to whose orders the overseers are bound to conform.

But these new methods, though found to be beneficial, were upon the whole not attended by results sufficiently effective. Their introduction too not being made compulsory by law, but left to the option of the inhabitants, the conflict of opinions which generally attends all subjects of political economy, or the dislike of change or some inactivity in the public mind, prevented their adoption in the great majority of the parishes.

In the meantime the evils resulting from the mismanagement of the poor continued to increase.

The negligent and injudicious administration of the parochial funds, which prevailed in various parts of the kingdom, had the effect of withdrawing from the impotent poor, part of the provision intended for them by law, and wasting it on those who were able, but unwilling, to work ; and this led by natural consequence to the encouragement of idleness, improvidence and vice among the lower classes of society, and to a progressive and alarming increase in pauperism and in the amount payable for poor rates.

The case was aggravated by some inherent defects in the existing system, which, while it remained unaltered in principle, tended strongly to prevent its practical improvement.

For the duty of executing the poor law being upon this system left in every instance to the parish itself, which stood in no subordination, and owed no deference to any external authority, reforms suggested from without seldom met with much attention, and little benefit was derived from any example of superior management exhibited in

(*p*) See Reports of the Poor Law Commissioners ; Archbold's Poor Law Act, p. 46 (*n.*) ; Report on Local Taxation, p. 55.

(*q*) See as to select vestries and vestries generally, *supra*, vol. i. pp. 112, 113.

other parts of the kingdom. The size of a very large proportion of the parishes was also in general so limited, as to expose them to great disadvantages, both as to the employment and maintenance of the poor; the difficulty and expense of which are both obviously reduced, when the field of operation is wider, and provision can be made on a larger scale. It was under such circumstances that parliament recommended, in the year 1833, the issuing of a royal commission for inquiring into the state and administration of the laws relating to the poor. The persons, to whom that task was confided, exposed the evils of the existing system with great ability and effect, and from the views which they succeeded in impressing upon parliament, emanated the important statute 4 & 5 Will. IV. c. 76 (*r*), commonly denominated “The Poor Law Amendment Act.”

By this statute the administration of the parochial funds, and the management of the poor throughout the country, were placed for a period of five years (which has been since extended to the year 1847), under the superintendence and control of a central board of three persons (*s*), called “The Poor Law Commissioners,” who have power to make such regulations as they shall think proper, for guidance of the parochial authorities, (whether consisting of guardians, select vestries, or overseers,) in all matters of that description, and who are to be aided in their operations by a certain number of assistant commissioners (*t*). This extensive power is subject, however, to the check of superior authority. For all general rules prescribed by the commissioners must be submitted to one of the principal secretaries of state before they come into operation, and,

(*r*) The following are the statutes which have been passed since the 4 & 5 Will. 4, c. 76, for the continuation and amendment of the system thereby introduced: 5 & 6 Will. 4, c. 69; 6 & 7 Will. 4, c. 107; 7 Will. 4 & 1 Vict. c. 50; 1 & 2 Vict. c. 25; 2 & 3 Vict. c. 83; 2 & 3 Vict. c. 84; 3 & 4 Vict. c. 42; 5 & 6 Vict. c. 57;

7 & 8 Vict. c. 101.

(*s*) By sect. 119 of 1 & 2 Vict. c. 56, her Majesty may now appoint a fourth commissioner.

(*t*) Professional persons not being assistant commissioners, may also from time to time be appointed to make special inquiries; 5 & 6 Vict. c. 57, s. 2.

if disallowed by her Majesty in council, have no effect (*u*). They are also to be laid from time to time before the houses of parliament, where general reports of the proceedings of the commissioners are, moreover, to be annually deposited (*v*). The act farther empowers the commissioners, where they think it desirable, to direct that the relief of the poor in any parish shall be administered by a board of guardians, to be elected by the owners of property and rate-payers in such parish (*x*), in such manner as in the act particularized (*y*). They are also entrusted by the legislature with the important power of consolidating at their own discretion, so far as the relief and management of the poor is concerned, several parishes into one united body or union (*z*), under the government of a single board of guardians (*a*), to be elected by the owners and rate-payers of the component parishes (*b*); and the united parishes are to have a common workhouse provided and maintained at their common expense (*c*), though each is to remain separately chargeable with the expense of its own poor, whether relieved in or out of such workhouse (*d*). The principle of consolidation may indeed be carried farther, if such a measure shall appear expedient to those who represent

(*u*) 4 & 5 Will. 4, c. 76, s. 16; and see 5 & 6 Vict. c. 57, s. 3.

(*v*) 1 & 2 Vict. c. 56, s. 123.

(*x*) 4 & 5 Will. 4, c. 76, ss. 39, 40; Robinson v. Todmorden Union (in error), 3 Ad. & El. N. S. 675. As to election of guardians see farther provisions 7 & 8 Vict. c. 101, ss. 17—21.

(*y*) See new regulations as to manner of voting by owners and rate-payers, 7 & 8 Vict. c. 101, ss. 14—16.

(*z*) Ibid. et vide 7 & 8 Vict. c. 101, a. 66.

(*a*) 4 & 5 Will. 4, c. 76, s. 38. By 7 & 8 Vict. c. 101, s. 24, justices residing and acting in a union or parish are to be guardians *ex officio*.

(*b*) The acts as to marriage and registration, 6 & 7 Will. 4, c. 85, 86, and 7 Will. 4 & 1 Vict. c. 22, con-

tain various provisions relative to guardians in respect of these subjects; and by the Police Act, 2 & 3 Vict. c. 71, s. 41, the guardians are invested with certain duties in the case of nuisances.

(*c*) 4 & 5 Will. 4, c. 76, s. 26, 28.

(*d*) Ibid. s. 26; see 2 & 3 Vict. c. 84, as to the manner of recovering from each of the united parishes its contributions. As to the conveyance of workhouses and other property of parishes and unions, see 5 & 6 Will. 4, c. 69, and 7 Will. 4 & 1 Vict. c. 50; 7 & 8 Vict. c. 101. As to the parish where the workhouse shall for certain purposes be deemed situate, see 7 & 8 Vict. c. 101, s. 55. As to running away from workhouses, &c. see *ibid.* s. 59.

the different parochial interests; for by consent of the guardians in any union, whether formed under the act, or previously existing, the component parishes may (under sanction of the poor law commissioners) be united for the purposes of settlement, and of rating, as well as that of relief and management (*e*). On the other hand, however, it is provided that no union shall in future take place under Gilbert's Act without the previous consent of the commissioners (*f*).

This short historical review of the principles on which the poor law is founded seemed a proper preliminary to the consideration of the present practical system, which may be compendiously explained as follows.

According to the present law, a settlement is acquired by the following methods. 1. By *birth*. For wherever a child is first known to be, that is always *primâ facie*, and until some other can be shown, the place of its settlement. But if its parent can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *primâ facie* settlement of the child will be superseded by a derivative one or a settlement (*g*). 2. By *parentage*. For all legitimate children take the last settlement of the father, and after his death, of the mother, till they are emancipated from parental authority by marriage, or by attaining the age of twenty-one and living permanently separate from the parent, or contracting some relation inconsistent with domestic subjection (*h*). And when emancipated they retain the parental settlement last acquired before that event took place. A bastard child, on the other hand (having in the eye of the law no parent), was formerly held incompetent to claim a derivative settlement. By a recent provision (*i*), however, in the Poor Law Amendment Act, an illegitimate child born since the

(*e*) 4 & 5 Will. 4, c. 76, ss. 33, 34.

(*f*) Sect. 37.

(*g*) *R. v. Inhabitants of St. Mary, Leicester*, 3 Ad. & El. 644; *R. v. Walthamstow*, 6 Ad. & El. 301.

(*h*) *R. v. Witton cum Twam-*

brookes, 3 T. R. 355; *R. v. Inhabitants of Sowerby*, 2 East, 276; *R. v. Inhabitants of Everton*, 1 East, 526.

(*i*) 4 & 5 Will. 4, c. 76, s. 71; vide *R. v. Walthamstow*, *ubi sup.*; *R. v. Wendron*, 7 A. & E. 819.

act passed, is now to follow the settlement of his mother, until he attains the age of sixteen, or gains another for himself. But besides those of birth or parentage, there are also settlements acquired by the party's own act. For a female gains a derivative settlement: 3. By *marriage*, *i. e.* she may claim the settlement which belongs to her husband, and she retains that settlement after his death. If the man has no settlement (being born abroad and having acquired none), or his settlement is unknown, she retains that which belonged to her before marriage. But she cannot in any case acquire one in her own right during the marriage. A settlement may also be acquired, 4. By *renting a tenement (j)*, coupled with residence in the same parish for forty days. For this purpose, however, it is requisite that the party should have *bonâ fide* rented a tenement, consisting of a separate or distinct dwelling-house, or building, or of land, or of both, for the sum of 10*l.* a-year at the least for the term of one whole year; and that he should have occupied the same under such hiring, and actually paid the rent to the amount of 10*l.* for the term of one whole year at the least; and that for the same period he should have been assessed to and paid the poor rate in respect thereof (*k*). 5. A settlement may also be gained by being *bound apprentice (l)* under indenture or other deed, and inhabiting for forty days under

(*j*) As to who is occupier as tenant, who as servant, see *R. v. Inhabitants of Snape*, 6 A. & E. 278. No settlement is gained unless the whole subject demised be occupied by the party hiring; *R. v. Inhabitants of Berkswell*, 6 A. & E. 282. What is a separate building, *R. v. Henley-upon-Thames*, *ibid.* 294. As to renting land and incorporeal hereditaments, *R. v. Inhabitants of Hockworthy*, 7 A. & E. 492.

(*k*) 6 Geo. 4, c. 57, s. 2; 1 Will. 4, c. 18, s. 1; 4 & 5 Will. 4, c. 76, s. 66; *R. v. Inhabitants of Hertsmonceaux*, 7 Barn. & Cres. 551; *R. v.*

Parish of Stow, 4 Barn. & Cres. 87; *R. v. Inhabitants of Kibworth Harcourt*, 7 Barn. & Cres. 790; *R. v. Inhabitants of Great and Little Usworth*, 5 A. & E. 261.

(*l*) As to what is a hiring as apprentice, *R. v. Inhabitants of Billinghay*, 5 A. & E. 676. As to service by apprenticeship, *R. v. Inhabitants of Sandhurst*, 6 A. & E. 130; *R. v. Inhabitants of Clesworth*, *ibid.* 286; *R. v. Inhabitants of Exminster*, *ibid.* 598. As to fraudulent apprenticeship, *R. v. Inhabitants of Barmston*, 7 A. & E. 858.

such binding, either in the same parish where the service takes place, or a different one. But no settlement can be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise (*m*). The deed must in all cases be executed by the apprentice, except in the case of parish apprentices (*n*). 6. A settlement is gained (of a temporary kind) in any parish by having *an estate of one's own* (*o*) there, of whatever value, and whether the interest be legal or equitable (*p*). This particular species of settlement is founded on the principle of the common law, that a man shall not be removed from his own property (*q*). It is provided, however, that no person shall retain a settlement gained by virtue of any estate or interest in a parish for any longer time than he shall inhabit within ten miles thereof; and in case he shall cease to inhabit within that distance, and shall afterwards become chargeable, he shall be liable to be removed to the parish in which he was settled previously to such inhabitancy, or if he have gained a settlement in some other parish since the inhabitancy, then to such other parish (*r*). 7. Lastly, a settlement may be gained by being *charged to and paying the public taxes and levies of the parish* (*s*), excepting those for scavengers and highways, and the duties on houses and windows. But it is provided by 35 Geo. III. c. 101, s. 4, that no person shall gain a settlement on this ground in respect of any tenement or tenements not being of the yearly value of 10*l.*; and by 6 Geo. IV. c. 57, that a settlement shall not be acquired by paying paro-

(*m*) 4 & 5 Will. 4, c. 76, s. 67; R. v. Inhabitants of Maidstone, 5 A. & E. 326. By 5 & 6 Will. 4, c. 19, s. 26, it was enacted that parish boys may be put out apprentices in the sea service.

(*n*) Rex v. Inhabitants of Arnesby, 3 Barn. & Ald. 584; Rex v. Inhabitants of Cromford, 8 East, 25.

(*o*) Settlement by estate, R. v. Inhabitants of Ardleigh, 7 A. & E. 70.

(*p*) Rex v. Inhabitants of Belford, 10 B. & C. 54.

(*q*) 2 Nolan, 58.

(*r*) 4 & 5 Will. 4, c. 76, s. 68.

(*s*) R. v. Stoke Damerel, 6 A. & E. 308. See 1 & 2 Will. 4, c. 42, s. 5.

chial rates for any tenement (not being the person's own property), unless it consists of a separate and distinct dwelling-house or building, or land, or both, *bonâ fide* rented by him for 10*l.* a-year at the least for a whole year, and be occupied under such hiring for a year at least. This title to a settlement is therefore nearly merged in that of renting a tenement (*t*).

Such are the modes in which a settlement may now be acquired, and in which it has been capable of being acquired since the 14th August, 1834, the date of the passing of the Poor Law Amendment Act; by which statute, some material alterations were made in this branch of the law. As questions however may still, for some time to come, arise with respect to settlements gained under the law as it stood immediately before those alterations, it may be desirable to observe, that before the 14th August, 1834, a settlement might be gained by forty days' residence, accompanied with other circumstances of notoriety in addition to those which have been above enumerated, viz. 1. By hiring and service (*u*); which was where a person being unmarried and childless, was hired for a year, and served a year in the same service (*v*). 2 By executing any public annual office or charge within the parish for one whole year. We may also notice that the settlement by renting a tenement was at that period capable of being acquired without payment of the poor rate or being assessed to the same.

On this part of our subject we shall only add, that when by any of the modes above enumerated a person has gained a settlement in any parish, he is considered as settled there until he acquires a new one in some other place; but the latter acquisition supersedes the earlier.

All those who in any parish stand in need of relief, and apply for it, are entitled to be relieved there, or, as it is

(*t*) Arch. P. L. Act, Introduction, tendon, 6 A. & E. 296.
p. 3.

(*v*) As to cases thereon, see R. v.

(*u*) Hiring and service, R. v. Ret- Cowpen, 5 Ad. & E. 333.

commonly expressed, are *chargeable* to that parish. If settled there, they constitute its *settled* poor. If not settled there, they are termed its *casual* poor (x).

The parish, however, will be immediately relieved from the burthen, if the pauper has any relation competent and by law compellable, to maintain him. The relations who are so compellable are the father and grandfather, mother and grandmother, or children of the pauper (y). They are liable to maintain him at such rate as shall be assessed by an order of the justices at their general, quarter or petty sessions (z): and on refusal to obey such order, the sums so assessed are recoverable (with penalties) by a summary proceeding before two justices of the peace, and may be levied by distress and sale of the goods and chattels of the offender; in default of which he may be committed to prison (a). To secure the performance of this duty it is also provided by 5 Geo. I. c. 8, that where persons run away from their place of abode, leaving their wives or children chargeable to a parish, their goods, or the annual profits of their lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied towards the discharge of the parish, and the maintenance of the wife and children.

It is also enacted by 5 Geo. IV. c. 83, that persons able wholly or in part to maintain themselves or families by work or other means, and refusing or neglecting to do so, whereby they become chargeable to a parish, shall be deemed *idle and disorderly persons*; and may be punished by a single justice, on oath of one witness, by imprison-

(x) See 33 Geo. 3, c. 35, s. 3; R. v. St. Pancras, 7 A. & E. 750; see 7 & 8 Vict. c. 101, s. 26, as to the relief of widows in certain cases residing out of their places of settlement.

(y) 43 Eliz. c. 2, s. 7.

(z) 59 Geo. 3, c. 12, s. 26.

(a) 4 & 5 Will. 4, c. 76, ss. 78,

99. By sections 56 and 57 of same statute, relief given to a child under sixteen, not blind or deaf and dumb, shall be considered as given to the parent; and every person is to maintain his wife's children before marriage, until sixteen or the death of the mother.

ment in the house of correction with hard labour, for any time not exceeding one calendar month.

The desertion of a family is still more severely penal; for persons running away and leaving their wives or children chargeable are deemed *rogues and vagabonds*, and incur by the same act the like imprisonment for any time not exceeding three calendar months (*b*).

If there are no relations to whom recourse can be had, the settled poor are then to be relieved by the parish, so long as their necessity continues; but it is a general rule, that, where the parish or union to which the parish belongs has a workhouse, no out-door relief (that is, no relief out of the work-house) can be legally given in contravention of such orders and regulations as the poor law commissioners may prescribe on that subject (*c*) and if paupers who are able to work refuse to do so, they may be committed to the common gaol or house of correction (*d*).

With respect to the casual poor, they may in general be *removed*; and they are entitled to relief only till such removal can be effected. All such as were born in Scotland or Ireland, the Isle of Man, Scilly, Jersey, or Guernsey (*e*), and have acquired no settlement in England, may upon complaint of the churchwardens and overseers be removed to the place of their birth or settlement, with their families, (that is, with their wives and children, or such of them as are chargeable, and have yet acquired no settlement in their own right,) by virtue of an order or *pass* under the hands and seals of two justices of the peace. Those who have a known place of settlement in England

(*b*) As to the expense of prosecutions in offences of this nature, see 7 & 8 Vict. c. 101, s. 69.

(*c*) 4 & 5 Will. 4, c. 76, s. 52.

(*d*) 43 Eliz. c. 2, s. 4; 55 Geo. 3, c. 137; 7 & 8 Vict. c. 101, s. 57, 58.

(*e*) 17 Geo. 2, c. 5; 59 Geo. 3, c. 12; 5 Geo. 4, c. 83; 3 & 4 Will. 4,

c. 40; 7 Will. 4 & 1 Vict. c. 10; 3 & 4 Vict. c. 27; 7 & 8 Vict. c. 42; R. v. Whitehaven, 5 B. & Ald. 720; R. v. Great Clacton, 3 B. & Ald. 410; R. v. Leeds, 4 B. & Ald. 498; R. v. Heaton Norris, 7 B. & C. 619; R. v. Benett, 2 B. & Adol. 712; R. v. Preston, 12 Ad. & E. 822.

(wherever born) may also be removed to it with their families under an *order of removal*. This order is to be obtained from two justices of the peace upon complaint of the overseers of the parish which has become chargeable. It is usually founded on an examination of the pauper as to the place of his last settlement; and notice in writing of such order, and of the examination on which it was made, must be sent by the guardians or overseers, to the overseers of the parish to whom it is directed (*f*). If that parish submits (*g*) to the order, or does not give notice of appeal (*h*) from it within twenty-one days, the pauper is to be removed accordingly; but if such notice is given within that period, he shall be kept in the original parish until the same (if duly prosecuted) shall be determined (*i*). The appeal is to the quarter sessions for the county, division, or riding, where the parish is situated from which the removal is directed to take place. If that court thinks fit, it may order the parish against which the appeal shall be decided to pay costs to the other, to such amount as the court shall certify, and as may appear just and reasonable (*k*); and where the respondents succeed they are entitled to the costs of the relief and maintenance of the pauper from the time they gave the notice of the order of removal (*l*). In the event of some point of law arising upon which the justices feel themselves unable to decide, they have the power of making their order or de-

(*f*) 4 & 5 Will. 4, c. 76, s. 79.

(*g*) The rate payers have no power of appeal independently of the parish officers; *R. v. Colbeck*, 12 Ad. & E. 161.

(*h*) As to *time of appeal*, see *R. v. Suffolk* (justices), 4 Ad. & E. 319. As to *notice of grounds of appeal*, see *R. v. Holbeach*, 5 Ad. & E. 685; *R. v. Kelvedon*, *ibid.* 687; *R. v. Withernwick*, 6 Ad. & E. 273. As to *statement of grounds of appeal*, *R. v. Kimbolton*, *ibid.* 603; *R. v. Derbyshire*,

ibid. 885; *R. v. Warwickshire*, *ibid.* 873; *R. v. Misterton*, *ibid.* 878. As to *appeal to next sessions*, *R. v. Cornwall*, *ibid.* 894; see also *Exp. Broseley*, 7 A. & E. 423; *R. v. Church Knowle*, *ibid.* 471; *R. v. Hockworthy*, *ibid.* 492; *R. v. Lydeard St. Lawrence*, 11 A. & E. 616.

(*i*) 4 & 5 Will. 4, c. 76, ss. 79, 80, 81, 83; *R. v. Kent* (Justices), 6 B. & C. 639.

(*k*) 4 & 5 Will. 4, c. 76, s. 82.

(*l*) *Ibid.* s. 84.

cision in the appeal, subject to a *special case*; that is, to connect it with a statement of the facts proved before them, that the opinion of the Court of Queen's Bench may be taken upon the point of law (*m*). The latter court then issues a writ of *certiorari*, to remove the proceedings to its own jurisdiction, which, being delivered to the clerk of the peace for the county, is returned by him, together with the order of sessions and the special case. The matter of law is then argued before the Court of Queen's Bench, which delivers its opinion, and affirms or quashes the order, as it may be found to be correct or otherwise.

Such is the course of proceeding when there is any known place of settlement. If there is none, and if the pauper was not born in any part of the united kingdom to which he can be *passed*, then (as the law authorizes no order of removal except to some place of settlement) he must remain of necessity in the parish where he is chargeable; and he may claim relief there, so long as he continues to be in want, upon the same footing with its settled poor, until some place of settlement be discovered. There are also some particular cases in which the removal even to a known place of settlement is illegal. For the wife of a person without a settlement cannot be removed to her place of maiden settlement, so as to separate her from her husband, unless by mutual consent (*n*); nor can a child be taken away from its mother during its nurture (that is, until the age of seven years), whether it be legitimate or a bastard (*o*). So if the pauper is unable to travel by reason of sickness or infirmity, or cannot travel without danger, the justices making the order or granting the pass are required to suspend the execution of the same until they are satisfied that it may be safely executed (*p*)—and it is provided that such suspension shall extend to any

(*m*) As to the practice on *certiorari*,
R. v. Abergele, 5 Ad. & E. 795.

(*n*) R. v. Eltham, 5 East, 113; R.
v. St. Mary Beverley, 1 B. & Ad. 201.

(*o*) Cald. 6; *Shermanbury v. Bol-*
ney, 6 Carth. 279.

(*p*) 35 Geo. 3, c. 101, s. 2, and 49
Geo. 3, c. 124.

other of the pauper's family who shall be mentioned in the pass or order (*q*). With respect also to persons who are in custody for felony, misdemeanor, debt, or lunacy, we may observe that they cannot be removed under the poor laws, from the parish where they happen to be confined. Several acts however have been passed for their relief in prison (*r*); in some cases out of the parochial funds, in others out of the county rate.

The duty of *relief*, where the parish is under the government of guardians or a select vestry, belongs to those authorities (*s*), according to the provisions of the acts under which they have been respectively appointed, and subject to the rules of the poor law commissioners. Where there are no such authorities it belongs (subject to the same rules) to the overseers; or, where there is a local act of parliament on the subject, to the authorities by such act established (*t*).

In all cases, however, of *sudden and urgent necessity* arising in a single or united parish under the government of guardians or a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give such temporary relief as the case may require; which he is directed to do, in articles of absolute necessity, but not in money; and if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may direct it to be given by an order under his hand and seal, and the overseer disobeying such order incurs a penalty of

(*q*) 49 Geo. 3, c. 124.

(*r*) 19 Car. 2, c. 4; 23 Geo. 3, c. 23, s. 2; 52 Geo. 3, c. 160; 53 Geo. 3, c. 113; 9 Geo. 4, c. 40.

(*s*) Guardians have also by 7 & 8 Vict. c. 101, s. 31, the power of directing the pauper to be *buried* at the expense of the parish.

(*t*) Where there is a local act, the commissioners have a power of regulation and superintendence; but cannot abolish the local boards; Ninth Annual Report of Poor Law Commissioners, 1843, pp. 18, 19. For provisions as to local acts, see also 7 & 8 Vict. c. 101, s. 74—76.

not exceeding 5*l.* (*u*). Whatever be the settlement or residence of the pauper, any justice of the peace is also empowered, in a parish similarly circumstanced, to order *medical* relief in all cases of sudden and dangerous illness, the overseer being subject to the same penalty as in the former case for disobedience (*x*). And in unions formed under the Poor Law Amendment Act any two justices of the peace usually acting for the district may, at their discretion, order any adult person, who is entitled to relief, and unable to work, to be relieved, if he desires it, without residing in the workhouse (*y*). It is provided however that one of the justices shall certify in such order, of his own knowledge, that the person is unable to work.

These powers of overseers and magistrates to afford relief in particular cases apply (it will be observed) only to parishes under the management of guardians or a select vestry (*z*). In parishes not so circumstanced, their authority in this matter is not specific but general. The duty of administering relief belongs universally, and (in the first instance) exclusively to the overseer. But if he refuses it in any case in which it is reasonably claimed, it may be granted by order of any justice of the peace residing in the parish, or (if there be none resident) in the parish next adjoining, or by order of the justices in their respective quarter sessions; and if the overseer disobeys such order he may be indicted (*a*).

The duty of making and levying (*b*) the poor-rate, or parochial fund out of which the relief is to be afforded, still belongs (as before the late changes in the law of relief) to the churchwardens and overseers; and the concurrence of the inhabitants is not necessary (*c*). But for the better execution of these duties, the recent acts relating

(*u*) 4 & 5 Will. 4, c. 76, s. 54.

(*x*) Ibid.

(*y*) Ibid. s. 27.

(*z*) Ibid. s. 54.

(*a*) 3 W. & M. c. 11, s. 11; 9

Geo. 1, c. 7, s. 1.

(*b*) As to the distress for poor rate,
43 Eliz. c. 2, ss. 12, 13.

(*c*) 43 Eliz. c. 2, s. 1; 7 & 8 Vict.

c. 101, s. 63.

to the amendment of the poor law, authorize the appointment of *collectors and assistant overseers* (*d*). The rate is raised prospectively (*e*) for some given portion of the year, and upon a scale adapted to the probable exigencies of the parish (*f*); and the act of Elizabeth directs that it should be raised by “taxation of every inhabitant, parson, vicar, and other (*g*), and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods” in the parish. As an *occupier* (*h*) a man is rateable for all lands (*i*) which he occupies in the parish, whether he is resident or not (*k*); but the tenant (and not the landlord) is considered as the occupier within this statute (*l*). As an *inhabitant* (*m*) a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the local and visible personal property he had within the parish, and of which he made profit (*n*); but by 3 & 4 Vict. c. 89 (continued by 5 & 6 Vict. c. 50, 6 & 7 Vict. c. 48, and 7 & 8 Vict. c. 40) the liability to taxation in regard to inhabitancy is now taken away until October, 1845 (*o*).

(*d*) See 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 61, 62. As to overseers and assistant overseers' accounts, *R. v. Watts*, 7 A. & E. 461.

(*e*) As to the objection that the rate is retrospective, see *R. v. Gloucester*, 5 T. R. 346; 1 Nolan, 62.

(*f*) 1 Nolan, 61, 62.

(*g*) As to the exemption of scientific and literary societies, see 6 & 7 Vict. c. 36.

(*h*) As to occupier as servant, *R. v. Wall Lynn*, 8 A. & E. 379. A man in service may be rated as an independent occupier, *S. C.* 1 W. W. & H. 366. And see *R. v. Ponsonby*, 3 Ad. & El. N. S. 14.

(*i*) As to rateability of *tithes*, *R. v. Joddrell*, 1 B. & Ad. 403; *R. v. Barker*, 6 A. & E. 388. As to rateability of *corporations*, *R. v. Mayor*

of York, 6 A. & E. 419. As to the rateability of a *gas company*, *R. v. Birmingham and Staffordshire Gas Company*, *ibid.* 634; *R. v. Commissioners for lighting Beverley*, *ibid.* 645. As to rateability of *machinery*, *Reg. v. Guest*, 7 A. & E. 951. Rateability of *municipal corporations*, 4 & 5 Vict. c. 48.

(*k*) 1 Bott, 112.

(*l*) *R. v. Welbank*, 4 M. & S. 222.

(*m*) As to competency of rated inhabitants to give evidence, 3 & 4 Vict. c. 26; *Doe d. Boulton v. Adderley*, and *Doe d. Batchelor v. Bowles*, 8 A. & E. 502; *S. C.* 1 P. & D. 469.

(*n*) *R. v. Lumsdaine*, 1 W. W. & H. 587.

(*o*) As to former practice of rating stock in trade, see Report on Local Taxation, pp. 21, 35.

By a recent act (6 & 7 Will. IV. c. 96) (*p*) it is provided, that after such period as the poor law commissioners shall direct, no poor-rate shall be of any force which shall not be made on an estimate of the net annual value of the several hereditaments rated, that is to say, the rent at which the same may reasonably be expected to be let from year to year, free of all usual tenant rates and taxes, and tithe commutation rent-charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any), necessary to maintain them in a state to command such rent. The act also prescribes in what form the rate shall be made, and what particulars it shall comprise, and requires that the parish officers shall sign a declaration at the foot of it, to the effect that these particulars are true and correct as far as they have been able to ascertain by their best endeavours. The poor law commissioners are also empowered by this act to order a new valuation to be made in any parish or union, upon representation, in writing, from the board of guardians under their common seal, or from the majority of the parish officers (*q*).

By 43 Eliz. c. 2, s. 1, no rate can be deemed valid unless it be allowed by two justices, and public notice thereof be given in the parish church on the Sunday next after the same has been allowed. The allowance by the justices is a mere matter of form (*r*) ; but after allowance and publication, any person aggrieved by the rate, and having reasonable objection to it, as irregular or unequal, may appeal against it to the next practicable quarter sessions of the county, riding, or division (or, in some cases, of the corporation or franchise) in which the parish is situate.

But so far as regards objections on the ground of irregularity, unfairness, or incorrectness of valuation, appeals

(*p*) As to this act (the Parochial Assessment Act), see Report on Local Taxation, pp. 28, 48.
(*q*) Vide as to the appeal under this

act, *R. v. St. Alban's*, 1 W. W. & H. 680.

(*r*) *R. v. Dorchester (Justices)*, 1 Str. 393.

may now also be preferred to another jurisdiction at the option of the party aggrieved; for by 6 & 7 Will. IV. c. 96, the justices in petty sessions shall, four times at least in every year, hold a special sessions for hearing appeals (*s*) on any ground of that description within their respective divisions, and their decisions shall be conclusive, unless the parties impugning it shall, within fourteen days, give notice of appeal therefrom to the next general sessions or quarter sessions of the peace. In either course of proceeding the justices have power to affirm, quash, or amend the rate; or, if it become necessary to set the whole aside, may order the overseers to make a new one (*t*). They have also authority to award costs to the successful party (*u*); and the court of quarter sessions may make its decision (as in the case of an order of removal) subject to a special case.

It is the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor rate, to render to the proper (*x*) auditors, or if there be none, to the guardians, or (where there are no such officers) to the justices in petty sessions, once in every half-year (and oftener if required by the rules of the poor law commissioners), an account of all monies and things received and expended, and verify the same on oath if required (*y*); and all balances remaining from time to time in their hands may be recovered from them by a summary proceeding before two justices of the peace (*z*). Overseers

(*s*) 6 & 7 Will. 4, c. 96, s. 6. As to appeal against rate, *R. v. George*, 6 A. & E. 305; *R. v. Bond*, *ibid.* 905.

(*t*) 17 Geo. 2, c. 38, s. 6; 41 Geo. 3, c. 23; 6 & 7 Will. 4, c. 96, s. 6.

(*u*) *Ibid.*

(*x*) See 4 & 5 Will. 4, c. 76, and 7 & 8 Vict. c. 101, s. 32.

(*y*) Any parish officer supplying for his own profit goods given in parochial relief, incurs a penalty of 5*l.*; 4 & 5

Will. 4, c. 76, s. 77; vide *Henderson v. Sherborne*, 2 Mee. & W. 236. As to sale of parish property and parish debts, 5 & 6 Vict. c. 18; Report of Poor Law Commissioners for 1843, p. 29.

(*z*) 4 & 5 Will. 4, c. 76, ss. 47, 99; 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 32—38. See also Sir John Hobhouse's Act, 1 & 2 Will. 4, c. 60; *R. v. St. Marylebone*, 5 A. & E. 268.

are also bound to render an account at the end of their year of office (a).

These are the general heads of the law relating to the poor (b); many branches of which are of too recent introduction to have been yet fairly subjected to the test of experience. The great object, however, of the whole system is to give such relief as charity requires to the impotent poor, or those unable to find employment, without affording encouragement to the idle; and its operation can never be considered as safe or satisfactory, except so far as it tends to promote that combined result. For while humanity and religion prescribe the succour of the destitute, nothing is more obviously unreasonable than to compel the industrious part of the community to maintain those who are unwilling to labour; and surely they must be very deficient in foresight as well as in justice [who suffer one half of a parish to continue dissolute and unemployed, and at length are amazed to find that the industry of the other half is not able to maintain the whole.]

(a) 4 & 5 Will. 4, c. 76, s. 47; vide *R. v. Johnson*, 5 A. & E. 340. There are several other rates which in practice are levied parochially upon the same assessment, and by the same officers as the poor's rate; as to which, see *Report on Local Taxation*, p. 62; and by 7 & 8 Vict. c. 33, the county rate, and all other like rates, are now to be raised through the agency of the guardians and overseers of the poor, and without the intervention (which the law formerly required) of the high constable.

(b) It has been felt important to

condense as far as possible the account given of this complex subject. No mention has therefore been made in the text of two provisions introduced in the course of last session, which, though of considerable interest and importance, did not appear to require notice in so general an exposition of the poor law, namely, those which empower the commissioners to combine unions and parishes into school districts and into districts for asylums for the temporary accommodation of the houseless poor. See 7 & 8 Vict. c. 101, s. 40—54.

CHAPTER III.

OF THE LAWS RELATING TO CHARITIES AND
BENEVOLENT INSTITUTIONS.

I. CHARITIES.—From the subject of the maintenance provided by law for the poor, we may pass, by no abrupt transition, to that of public charities.

Charities have been always much favoured by the law (*a*). Thus, though gifts to *superstitious* uses were made void by a statute passed at the period of the Reformation (*b*), a distinction was allowed in favour of those for charitable purposes; which were held not to fall within the operation of that statute. For “no time,” as Lord Coke observes, “was so barbarous as to abolish learning, or so uncharitable as to prohibit relieving the poor” (*c*). By the statute 39 Eliz. c. 5, (made perpetual by 21 Jac. I. c. 1,) any person is enabled by deed enrolled in Chancery to found a hospital, and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements, to hold to them and their successors, without the king’s licence (which by the statutes of mortmain is in general required where land is conveyed to a body corporate); subject only to these conditions, that the lands be freehold, in fee simple, of the clear value of 10*l*., and not exceeding that of 200*l*. per annum.

The same disposition to favour and encourage charities has been evinced in other instances. Thus, by the Statute of Charitable Uses, 43 Eliz. c. 4, the lord chancellor

(*a*) Bac. Ab. Ch. Uses, E.

6, c. 14.

(*b*) 23 Hen. 8, c. 10. See also 15 Ric. 2, c. 5; 37 Hen. 8, c. 4; 1 Ed.

(*c*) Porter’s case, 1 Rep. 26.

is empowered to award commissions to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of the fund; though the universities and cathedrals, and all colleges, hospitals, and free-schools, having special visitors or governors, are exempted from this provision (*d*).

And whereas the statutes of mortmain prohibit in general the endowment of collegiate or corporate bodies with land, without the king's licence, and some doubts arose at the time of the Revolution, as to the right of the crown to exercise this dispensing power (*e*), therefore, by a statute passed at that period (7 & 8 Will. III. c. 37), after reciting that it would be a great hindrance to learning and other good and charitable works, if persons inclined to grant lands to bodies incorporated for good and public uses should not be permitted to do so, it was enacted (in confirmation and extension of the prerogative antecedently vested in the crown in this particular) that the king may grant, to any persons whatever, licence to alien, purchase, or hold in mortmain.

So far the interposition of the legislature had been uniformly favourable to charities. Some abuses, however, were afterwards found or supposed to attend the power of devising lands by will, or making them over at the approach of death, for purposes of this description; and by 9 Geo. II. c. 36, after reciting that many large and improvident alienations of land had of late been made by dying persons to charitable uses, it was enacted that no lands or tenements, or money to be laid out in the purchase thereof, shall be given or conveyed, or anyways charged or incumbered, in trust for the benefit of any such uses, unless by deed, indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the grantor, and enrolled, within six calendar months after its execution, in

(*d*) See Collison's case, Hob. 136.

(*e*) See Hovenden's Black, vol. ii. p. 272.

the High Court of Chancery. This provision, with the exceptions to which it is subject, we had occasion to consider in a former volume (*f*); and it will therefore be unnecessary to dwell upon it farther in this place. We shall only remark, that it has no reference to dispositions of mere personal estate, when not directed to be laid out in land; and that such dispositions, whether by will or otherwise, may consequently be made, without restraint, to uses of a charitable description.

The law has also subjected charitable endowments to some check in the particular case of a lying-in hospital; for by 13 Geo. III. c. 82, after reciting that such hospitals merited support and encouragement, it is nevertheless enacted that no establishment of the kind shall be set on foot without a previous licence from the quarter sessions, and regulations are made to prevent illegitimate children, born within such hospitals, from being chargeable to the parish of their births.

When a charitable commission issues under the 43 Eliz. c. 4, the decree of the commissioners is returned into the Petty Bag Office of the Court of Chancery; and it may be contested on the equity side of that court. The proceedings for that purpose are treated as an original suit, in which the parties are not bound by the evidence before the commissioners, but may allege what new matter they please (*g*). Upon these allegations they go to proof, and examine witnesses upon all the matters in issue; and the court may decree the respondent to pay all the costs, though no such authority is given by the statute; and as the proceeding is throughout considered as an original cause, an appeal lies of course from the chancellor's decree, notwithstanding any loose opinions to the contrary (*h*).

Commissions, however, under the statute of Elizabeth have been long disused, their place being supplied by remedies of a more simple and effective kind. For independently

(*f*) Vide sup. vol. i. p. 428.

(*h*) Ibid.; 2 Vern. 118.

(*g*) 1 Bac. Ab. Ch. Uses, F.; 3 Bl. Com. 428.

of this statute, the king, as *parens patriæ*, has the general superintendence of all charities (*i*) not otherwise sufficiently protected (*k*); which he exercises by the keeper of his conscience, the chancellor. [And, therefore, whenever it is necessary, the attorney-general, at the relation of some informant (who is usually called the relator), files *ex officio* an information in the Court of Chancery, to have the charity properly established (*l*);] and it is not essential that the relators should be the persons principally interested; for any persons (though the most remote of them who fall within the contemplation of the charity) may stand in that capacity (*m*).

Indeed, a still more summary redress for abuses in charitable trusts has been in modern times provided by the legislature; for by statute 52 Geo. III. c. 101, it is enacted that in every case of the breach of a trust created for charitable purposes, or wherever the direction of a court of equity shall be deemed necessary for the administration of such a trust, any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, apply for relief by petition to the lord chancellor, or master of the rolls, or keeper of the great seal, or to the Court of Exchequer. The petition is to be heard in a summary way, and the order which the court may make is to be final and conclusive, unless within two years afterwards there shall be an appeal to the House of Lords.

By a statute passed in the same year (52 Geo. III. c. 102,) provision was also made for the registry and securing of charitable donations, in order to prevent their benefits from being lost. A memorial of the funds and objects of the then existing charities, and the names of the founders (when known), and of the persons having custody of the deeds of endowments, and of the trustees

(*i*) Vide sup. vol. ii. p. 528.

(*k*) As to this qualification of Blackstone's doctrine, see Shelford, 268.

(*l*) 3 Black. Com. 428; Eyre v.

Countess of Shaftsbury, 2 P. Wms. 118; Att. Gen. v. Middleton, 2 Ves. sen. 329; Same v. Brereton, ibid. 426.

(*m*) Att. Gen. v. Bucknall, 2 Atk.

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or possessors of the estates, was required to be registered by such trustees or possessors, within six months from the passing of the act, in the office of the clerk of the peace of the county or town, who was to transmit a duplicate into the enrolment office (n) of the Court of Chancery. So, with respect to future charities, created by any deed or instrument, a like memorial is required, within twelve months after the decease of the donor; but donations neither secured on land nor permanently invested in the funds, or the management of which is left to the discretion of trustees, are (with many other particular cases) excepted from the provisions of the act.

At a subsequent period, the attention of the legislature having been particularly directed to such charitable endowments as have in view the great object of imparting useful knowledge to the lower classes of society, the statute 58 Geo. III. c. 91, was passed, to authorize the issuing of a commission “to inquire into the amount, nature, and application of the produce of any estates or funds from time to time appropriated to the education of the poor;” and a commission having accordingly been appointed, its powers were soon afterwards, by statute 59 Geo. III. c. 81, extended to all endowed charities of whatever description, subject only to certain specified exceptions. By another act, 59 Geo. III. c. 91, passed during the course of their labours, the commissioners were also entrusted with the additional duty of certifying to the attorney-general the particulars of any case that appeared to them to require the interposition of a court of equity; upon which that officer was authorized to proceed by petition, information, or otherwise (as the case might require) in the Court of Chancery or the Exchequer. It was also provided, that the trustees of any charity who conceived its statutes or regulations to be insufficient, might, by consent of five or more of the commissioners,

(n) As to this office, see 5 & 6 Vict. c. 103.

present a petition to the Court of Chancery or Exchequer, praying for such relief as the case required (*q*). This commission was continued and its powers enlarged by several successive acts of parliament (*r*), and after it had expired was again succeeded by a new commission with similar powers, and under the like parliamentary authority (*s*); which latter finally terminated on 1st July, 1837 (*t*). The reports presented under the successive commissions are numerous, and have been printed by order of the House of Commons.

Within the last few years there have been many other enactments of a miscellaneous kind, for the advantage and protection of charities. By 1 & 2 Geo. IV. c. 92, the trustees of charitable estates are empowered to exchange them for other lands; it being first ascertained, according to a method of proceeding directed by the act, that the proposed exchange will be beneficial to the charity. By 3 Geo. IV. c. 72, s. 11, when the Commissioners for building additional Churches shall have in any case divided a parish into two or more distinct parishes, or district parishes, or chapelries for ecclesiastical purposes, they may apportion, if they think fit, among the several divisions so made, any charitable bequest or gifts bestowed upon the entire parish. By 1 & 2 Will. IV. c. 45, the provisions of an act of the 29 Car. II. c. 8 (*u*), for facilitating grants by ecclesiastical persons towards the augmentation of small livings, were confirmed and extended. By Sir J. Hobhouse's Act, 1 & 2 Will. IV. c. 60 (passed for regulation of vestries), the vestry of every parish adopting that act is directed to make out, once at least in every year, a list of all charitable foundations and bequests belonging to the parish and under the control of the vestry, with the names of the trustees, and of the persons partaking

(*q*) 59 Geo. 3, c. 91, s. 5.

(*r*) 5 Geo. 4, c. 58; 10 Geo. 4, c.

57.

(*s*) 1 & 2 Will. 4, c. 34; 2 Will.

4, c. 57; 5 & 6 Will. 4, c. 71; 7

Will. 4 & 1 Vict. c. 4.

(*t*) See 7 Will. 4 & 1 Vict. c. 4.

(*u*) Sect. 8.

the benefit, and to leave the list open for the inspection of the rate-payers (*v*). By 2 Will. IV. c. 57, s. 3, it is provided, that where all the persons in whom real property has been invested for a charitable purpose are dead, it shall be lawful for the Court of Chancery, or the Court of Exchequer, on the petition of the Attorney-General, or of the persons administering the fund, to direct advertisements to be inserted in the newspapers, calling on the representatives of the last surviving trustee to appear and establish his title; in failure of his doing which within a time limited, the court may appoint new trustees to whom the land shall be conveyed accordingly. By 2 & 3 Will. IV. c. 115, the laws applicable in England to Protestant dissenters, in respect of their schools and places for religious worship, education, and charitable purposes, are extended to the Roman Catholic subjects of the realm, in respect of their establishments of the same description. By the Poor Law Amendment Act, 4 & 5 Will. IV. c. 76 (*x*), the Poor Law Commissioners are empowered at their discretion to require from all persons, holding property in trust for or applicable to the relief of the poor, or being in receipt of the profits, a true and detailed account in writing of all particulars relating to such property and its appropriation; and the statement so obtained is to be open to the inspection of the rate-payers. But funds raised from time to time by voluntary contribution of the inhabitants, are excepted from the provision. By 3 & 4 Vict. c. 77, passed for improving the condition and extending the benefits of endowed grammar schools, courts of equity are empowered to extend the system of education in such schools, and regulate the right of admission into the same, and to establish schemes for the application of their revenues; paying due regard, nevertheless, to the intention of the respective founders or benefactors. And lastly, by 4 & 5 Vict. c. 38, various regulations are made, calculated to afford farther facilities

(*v*) Sect. 39.(*x*) Sect. 74.

for conveying lands, to be used as sites for schools for the education of the poor (*y*).

Some account having been now given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to this subject.

The courts of equity (for to these the jurisdiction exclusively belongs) take cognizance of all charitable uses or trusts of a public description; and exercise, in relation to them, powers of a very extensive kind. Under the authority of these tribunals, trustees may be called to account for the charitable funds committed to their charge, or new trustees (where circumstances so require) may be appointed,—improvident alienations of the charitable estates may be rescinded,—schemes for carrying properly into effect the intention of the donor (where the nature of the case requires such interference) may be judicially projected and established, and every species of relief afforded which it is in the nature of such institutions to require. This equitable jurisdiction, however, is not allowed to usurp upon the proper province of those to whom the administration of the charity may have been confided. In the case of corporations endowed for charitable purposes, the management is usually vested by charter in governors, subject to a controlling or visitatorial power in the founder or his heirs, or in such persons as the founder shall appoint (*z*); and, with the proceedings of such functionaries the law does not interfere, unless they have also the management of the revenues, and are found to be abusing their trust (*a*). It is to be observed, however, that when the king is the founder of an eleemosynary lay cor-

(*y*) And see as to grants in aid of schools, out of the monies voted by parliament, from time to time, for promoting the education of the poor, 7 & 8 Vict. c. 37.

(*z*) *Eden v. Forster*, 2 P. Wms. 326; 3 Salk. 379; 1 Bl. Com. 480; *Philips v. Bury, Ltd.* Ray. 8.

(*a*) *Ex parte Kirkby Ravensworth Hospital*, 15 Ves. jun. 314; 2 Ves. jun. 42; *Ex parte Berkhamstead Free School*, 2 V. & B. 138; *Attorney-General v. Talbot*, 3 Atk. 673; *Same v. Lock*, *ibid.* 165; *Same v. Price*, *ibid.* 108.

poration, the visitatorial power is vested in the crown (*b*), and committed by royal authority to the Lord Chancellor, who may thus be called upon to redress abuses properly falling within the province of a visitor; but this jurisdiction belongs to him in his personal character only, and not as judge of the Court of Chancery (*c*).

With respect to the nature of the charitable trusts, to which the equitable jurisdiction attaches, we may remark that the word *charitable* is to be here understood in a very large sense. For not only gifts for the benefit of the poor are included, but endowments for the advancement of learning (*d*), or institutions for the encouragement of science and art, and for any other useful and public purpose (*e*).

The term comprises also donations for pious or religious objects; as to which we may remark that all objects are considered as religious, which tend to the benefit either of the Established Church of England, or of any body of dissenters sanctioned by law (*f*), and that by a recent act, 2 & 3 Will. IV. c. 115, trusts for the maintenance of Catholic worship are now placed on a similar footing. But a trust for the advancement of the Jewish religion, or of any faith hostile to Christianity, is not legal, and is excluded from the protection of a court of equity (*g*). Though the definition of charitable trusts is thus wide, we are, nevertheless, to remark that it does not extend to gifts of a strictly private character; for if a sum of money be bequeathed with direction to apply it “to such purposes of benevolence and liberality as the executor shall approve,” or even in private charity, the law will take no notice of such a trust (*h*). On the other hand, where a gift is for a

(*b*) *R. v. St. Catherine's Hall*, 4 T. R. 233; 1 Bl. Com. 480.

(*c*) Co. Litt. 96 a; *Ex parte Dann*, 9 Ves. 547.

(*d*) Ves. sen. 537.

(*e*) *Attorney-General v. Heelis*, 2 Sim. & Stu. 67; *Trustees of British Museum v. White*, *ibid.* 594; *Howse v. Chapman*, 4 Ves. 551.

(*f*) *Attorney-General v. Pearson*, 3 Meriv. 409; *Attorney-General v. Cock*, 2 Ves. sen. 273.

(*g*) *In re Masters, &c. of the Bedford Charity*, 2 Swanst. 487; 1 Dickens, 258.

(*h*) *Morice v. Bishop of Durham*, 9 Ves. 399; S. C. 10 Ves. 522; 1 Turn. & Russ. 260.

purpose clearly falling within the description of public charity, though expressed in the most general and indefinite terms, the trust will never be allowed to fail on account of the uncertain limitations of the objects, but the law will provide for it some particular mode of application. In some cases of this description, the right of disposition belongs to the queen, who makes it under her sign manual; in others it is made by the courts of equity (*k*).

It is a rule with respect to all charities, that the intention of the donor, so far as it is practicable and legal, shall be strictly observed; the law not permitting it to be varied without necessity, even by consent of his heir (*l*). But where it is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution, *cypres*, that is, in some method conformable to the general object, and adhering as closely as possible to the specific design of the donor (*m*). Thus, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provision, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects, the court directed it to be applied to the farther objects of instructing and apprenticing the children in the parishes for which the charity was designed (*n*). Moreover by a recent act, 7 & 8 Vict. c. 45, it is provided, as to meeting-houses founded for Dissenters, that so far as no particular religious doctrines or mode of worship shall have been prescribed by the deed or instrument of trust, the usage for twenty-five years shall be taken as conclusive evidence of the doctrines and worship which may be properly observed in such meeting-houses.

(*k*) 1 Turn. & Russ. 260; 10 Ves. 522; Bac. Ab. Ch. Uses.

(*l*) Attorney-General v. the Margaret and Regius Professors in Cambridge, 1 Vern. 55.

(*m*) 2 Ves. jun. 380; 2 Mylne & Keen, 576.

(*n*) The Bishop of Hereford v. Adams, 7 Ves. 324; Attorney-General v. Whitechurch, 3 Ves. 141.

Lastly, we may remark, that though among the civilians a legacy to pious or charitable uses was entitled to a preference, it is not so by our law, which directs that in the case of a deficiency of assets, the charitable legacies shall abate in proportion with the others (*o*). When the assets however, are sufficient, all such legacies remaining unpaid, carry interest at 4 per cent. from the end of one year after the testator's death (*p*).

II. BENEVOLENT INSTITUTIONS.—Besides charities, there are various institutions in this country, designed to encourage the industrious classes in frugal and provident habits, and to afford them some protection from those ordinary casualties which are incident to all men, but fall most severely on persons in the humbler ranks of life. Of these it is remarkable, that they were originally suggested and brought into use by private individuals, though they attracted at length the favourable notice of the legislature, and acts of parliament have been passed to sanction and promote them. Nor is it possible to refer to them, without pausing to pay the tribute justly due to the humanity and wisdom displayed in their establishment; for while they materially contribute to the physical and moral welfare of an important portion of society, they tend by direct consequence to prevent the increase of the public burthens connected with pauperism, and the public disorders resulting from distress among the lower classes. It is but seldom that human laws are able so successfully to reconcile the interests of rich and poor, and to blend, in such perfect harmony, the considerations of benevolence and expediency.

1. *Savings banks*.—These are institutions devised within the last thirty years, for the safe custody and increase of the small savings of the industrious poor. When regulated according to act of parliament, certain benefits and protections are afforded to them by law. The statutes containing the regulations are the 9 Geo. IV. c. 92 (repealing

(*o*) Bac. Ab. Ch. Uses, E.

(*p*) Attorney-General *v.* Hayes, 1 Atk. 356, n.

several former provisions), 3 & 4 Will. IV. c. 14 (*p*), and 7 & 8 Vict. c. 83. The institutions, sanctioned by these acts, consist of banks to receive small deposits of money, the produce of which is to accumulate at compound interest, and the principal and interest whereof are to be paid out to the depositors as required, deducting only from the produce the necessary expenses of management. The deposits are not to exceed 30*l.* in the whole in any one year (*q*); and no fresh deposit is to be received when the sum to which the depositor is entitled amounts to 150*l.* And where the sum standing in the name of any depositor amounts to 200*l.* (principal and interest included), no interest shall be paid on such deposit so long as it remains at that amount (*r*). The management is vested in trustees, who are prohibited from receiving, directly or indirectly, any benefit from the institution (*s*); and are required to invest the money deposited (beyond what necessarily remains in the hands of the treasurer to answer exigencies), in the Bank of England or Ireland, as the case may require (*t*). The monies invested are to be carried to an account kept in the names of the commissioners for reduction of the national debt, and denominated "The Fund for the Banks for Savings," which affords interest to the trustees at the rate of 3*l.* 5*s.* per cent. per annum, the arrears of which are to be carried half-yearly to the account of the principal (*u*). The interest payable to depositors is limited to 3*l.* 0*s.* 10*d.* per cent. (*x*), but the acts permit its accumulation by yearly or half-yearly rests (*y*). By way of farther protection to the funds of the society, every treasurer or cashier is to give security for the due execution of his office, and in case of his refusal to account to the trustees, or to pay over the monies in his hands, may be compelled to do so, in a summary way, by petition

(*p*) See also 5 & 6 Will. 4, c. 57,
as to Scotland.

(*q*) 9 Geo. 4, c. 92, s. 35.

(*r*) Sects. 35, 37; and 3 & 4 Will.
4, c. 14, s. 29.

(*s*) 9 Geo. 4, c. 92, s. 6.

(*t*) Sect. 11.

(*u*) Sect. 16; and 7 & 8 Vict. c. 83.

(*x*) 7 & 8 Vict. c. 83.

(*y*) 9 Geo. 4, c. 92, s. 17.

to the justices at quarter sessions (*z*). The trustees are also required to send to the office of the commissioners for reduction of the national debt annual accounts, exhibiting the balance due to the depositors (*a*); and to affix publicly to some conspicuous part of the office of the savings bank a duplicate of such account, and a list of the trustees and managers (*b*). To guard, on the other hand, against abuses of another description, no deposit is to be received without a disclosure of the name, occupation, and residence of the depositor, who is also, at the same time, or at any other time, when required by the trustees, to sign a declaration that he is entitled to no benefit from any other bank of the same description (*c*); and it is provided, that if such declaration be untruly made, he shall forfeit his deposit (*d*). Provisions are also made of a nature calculated to save expense to the members of these institutions. In case of the decease of a depositor whose estate does not exceed 50*l*, no legacy duty attaches; and no stamp duty is payable on the probate or administration (*e*); and if any person die, having a deposit not exceeding 50*l*. exclusive of interest, and no will or letters of administration be produced within one month afterwards, the money may be paid to or among such person or persons as shall appear to the trustees or managers to be the widow, or entitled under the Statute of Distributions (*f*). Upon the same principle it is directed, that the trustees may pay upon any deposit by a woman to the woman herself, unless her husband or his representative interferes (*g*), and that all disputes between the institution at large and any of its members or representatives, shall be referred to a cheap method of arbitration pointed out for that purpose, and such cases are consequently withdrawn from the jurisdiction of the courts of law (*h*).

(*z*) Sect. 10. See also 7 & 8 Vict. c. 83, s. 17.

(*a*) Sect. 46.

(*b*) Sect. 47.

(*c*) Sect. 34.

(*d*) Ibid. See also 7 & 8 Vict. c. 83.

(*e*) Sect. 40.

(*f*) 7 & 8 Vict. c. 83, s. 10.

(*g*) Ibid.

(*h*) 9 Geo. 4, c. 92, s. 45. See *Crisp v. Bunbury*, 8 Bing. 394; *R. v. Mildenhall Savings Bank*, 6 A. & E.

Any persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of the parliamentary provisions, upon causing the rules and regulations which they shall establish for its management to be entered in a book, to be kept by one of its officers, for the inspection of depositors. It is also requisite, however, that two copies of the rules shall be submitted to a barrister, officially appointed for the purpose, who is to certify whether the rules are in conformity to law, and pursuant to the legislative enactments (*i*). And one of the copies so certified is to be returned to the trustees, and the other to be transmitted to the commissioners for reduction of the national debt (*k*).

A separate system of savings banks has recently been provided for the army; it being enacted by 5 & 6 Vict. c. 71, that her Majesty may establish military or regimental savings banks, for the purpose of receiving sums of money from such of the non-commissioned officers and soldiers employed in her service either in the united kingdom or on foreign stations (the East Indies excepted), as shall be desirous of depositing the same, and the regulation for the management of such institution is entrusted to the secretary at war for the time being, in concurrence with the commander in chief and the lords of the treasury.

Savings banks have proved so acceptable to the people of this country, that on 20th November, 1843, the deposits in England, Ireland, and Scotland amounted, in the aggregate, to more than twenty-seven millions sterling, and the number of accounts opened was 935,350 (*l*). It seems reasonable, therefore, to consider them as of high importance, both in a moral and political aspect, and as amply

952; and see *R. v. Northwich Savings Bank (Trustees)*, 9 Ad. & E. 729; *R. v. Witham Savings Bank*, 1 Ad. & E. 320.

(*i*) Sect. 4.

(*k*) 7 & 8 Vict. c. 83, s. 19.

(*l*) Statistical Tables, by J. Tidd Pratt, Esq., the barrister appointed to revise the rules, &c.

deserving that degree of attention which they have received from the legislature.

2. *Friendly societies (m)*.—These establishments are of earlier date than any others of the class under consideration. The statutes, however, by which they are now governed, are of recent enactment, being the 10 Geo. IV. c. 56, the 4 & 5 Will. IV. c. 40 (n), and the 3 & 4 Vict. c. 73.

A society of this description has generally for its object the raising of a fund by subscription, for the mutual relief and maintenance of its members, or their wives, children, relations, or nominees, against certain casualties (o); but the purposes are not strictly circumscribed by law—for the acts of parliament sanction the establishment of such societies “for any other purpose which is not illegal (p).” The casualties, against which they have most commonly provided, are those of sickness, infancy, advanced age, widowhood, or other natural states or contingencies, the occurrence of which is susceptible of calculation by way of average; and when the society makes provision for any casualty to which this description is inapplicable, the law requires that the contributions for that particular purpose shall be kept separate and distinct, or the charges defrayed by extra subscription at the time such contingencies take place (q).

Friendly societies not assuring to individual members more than 200*l.*, are allowed to deposit their funds to any amount in savings banks (r); and the treasurer or trustees of the former institutions are required by the acts from time to time (with the consent of the members) to lay out such surplus of the fund as is not wanted for im-

(m) Reg. v. Cambridgeshire, 1 c. 39.

W. W. & H., N. S. 451; Day v. King, 5 Ad. & El. 359; R. v. Lord Godolphin, 8 A. & E. 338; Margett v. Parkes, 1 Dowl. & Lowndes, 582.

(n) Extended to Guernsey, Jersey, and the Isle of Man, by 5 & 6 Will. 4, c. 23, s. 10; see also 57 Geo. 3,

(o) See 10 Geo. 4, c. 56, s. 2; 4 & 5 Will. 4, c. 40, s. 2; Tyrrell v. Woolley, 1 Man. & G. 809.

(p) Ibid.

(q) Ibid.

(r) 4 & 5 Will. 4, c. 40, s. 9; 3 & 4 Vict. c. 73, s. 2.

mediate exigencies, either in savings banks or real security, or in the public funds or government securities, and to bring the dividends to account from time to time for the use of the society (*s*). And in friendly societies not assuring to individual members more than 200*l.*, the benefit of the same species of investment is afforded as in the case of savings banks—the monies being in that case carried to an account kept in the names of the commissioners for reduction of the national debt, called “The Fund for the Friendly Societies,” where interest is allowed upon the same terms as before stated with respect to the other institutions (*t*).

If any person entrusted with the funds refuse to account or to pay over the balance in his hands, the society is empowered to obtain relief in a summary way, and without payment of fees, by petition to the Court of Exchequer (*u*); and in the event of his death, bankruptcy, or insolvency, a priority of payment is secured to the institution (*x*). If any person being, or representing himself to be a member, shall fraudulently obtain possession of the monies of the society, or fraudulently withhold them, the money may be recovered, and the offender subjected to a penalty, by a summary proceeding before a justice of the peace (*y*). Upon the death of a member entitled to a sum not exceeding 20*l.*, similar provision is made for dispensing with the production of a will or letters of administration, as in the like case with respect to savings banks as to the sum of 50*l.* (*z*). And it is directed, that disputes between such societies and their members shall be referred to arbitration (*a*), and that if the society refuse to appoint an arbitrator, or no award shall be made, any two justices of the peace shall have jurisdiction to settle the controversy (*b*).

(*s*) 10 Geo. 4, c. 56, s. 13; 4 & 5 Will. 4, c. 40, s. 9.

(*t*) 10 Geo. 4, c. 56, s. 31.

(*u*) Ibid. ss. 14, 17.

(*x*) 4 & 5 Will. 4, c. 40, s. 12.

(*y*) 10 Geo. 4, c. 56, s. 25.

(*z*) Ibid. s. 24.

(*a*) Sect. 27.

(*b*) 4 & 5 Will. 4, c. 40, s. 7; Day v. King, 5 Ad. & E. 359; R. v. Wade, 1 B. & Ad. 61.

Annual statements of the funds of these institutions are to be supplied to every member (c) requiring the same, at a price not exceeding sixpence; and in order to promote the correct calculation of tables, every friendly society is required to send once in five years to the certifying barrister, a return of the rate of sickness and mortality which it has experienced (d), which returns are to be transmitted by him to the secretary of state, in order to be laid before parliament (e).

Any persons wishing to establish a society of this description, may make rules for the purpose, so that they are not repugnant to the laws of the realm, or the provisions of these acts of parliament (f). But to ascertain their correctness in these particulars, and their proper adaptation to effect the intention of the parties, two transcripts of the rules must be made out and submitted to the barrister appointed to certify, as in the case of savings banks; and when certified as approved by him, one of them is to be returned to the society, and the other sent, by the barrister, to the clerk of the peace for the county, to be laid before the justices at quarter sessions, and there confirmed and enrolled (g). Upon being so certified by the barrister, the rules take immediate effect, and are binding in point of law on all the parties concerned (h).

3. *Government annuity societies*.—The formation of these is authorized by 3 & 4 Will. IV. c. 14. The object is to enable persons among the industrious classes to make provision for themselves by purchasing, on advantageous terms, a government annuity for life or term of years. Societies regularly constituted under the act of parliament are empowered to be the medium for such contracts in favour of any persons whom they deem to be proper ob-

(c) 10 Geo. 4, c. 56, s. 33.

(d) Ibid. s. 34; and 4 & 5 Will. 4, c. 40, s. 6.

(e) 4 & 5 Will. 4, c. 40, s. 6.

(f) 10 Geo. 4, c. 56, s. 2.

(g) 4 & 5 Will. 4, c. 40, s. 4. As to enrolment, see *R. v. Gilkes*, 8 B. & C. 439; *R. v. Cambridgeshire Justices*, 8 A. & E. 338.

(h) Ibid.

jects for the intended benefit. The trustees or managers of the society are to act as the agents of the commissioners for reduction of the national debt in this transaction (*i*), and the expense to the party purchasing (who is relieved from all stamp duties (*j*)) is limited by the act to a very trivial amount (*k*). The annuity is charged on the consolidated fund (*l*), and made payable half-yearly (*m*), upon the draft of the trustees (*n*), supported (in the case of life annuity) by proof of the existence and identity of the nominee (*o*). It may either be *immediate* or deferred (*p*), so as to commence at any future period to be named by the purchaser. If *deferred*, it may be purchased either by a single sum paid in the first instance or by annual payments (*q*); and supposing the purchaser to live to the period of its commencement, he becomes entitled to an annuity equivalent to the value of all his payments, with the accumulation of compound interest. If on the other hand, in the case of a deferred life annuity, he dies before its commencement (*r*), or (having agreed to pay by annual instalments) becomes incapable, before that time, of continuing the payments (*s*), the whole money that has been actually paid is returned, exclusive of interest, to his representatives or to himself, as the case may be. In the case of a life annuity, whether immediate or deferred, that has come into possession, this advantage is also given to the purchaser,—that on the death of the person on whose life the annuity depended, the purchaser or his representatives become entitled, over and above the arrears, to a sum equal to one-fourth of the annuity, provided it be claimed within two years after the decease (*t*). All annuities under this act are declared to be personal

(i) Sects. 1, 13.

(j) Sect. 19.

(k) Sects. 3, 13.

(l) Sect. 10.

(m) Sect. 11.

(n) Sect. 14.

(o) Sect. 14.

(p) Sect. 1.

(q) Sect. 18.

(r) Ibid.

(s) Sect. 18.

(t) Sect. 11.

estate, are exempt from taxes and other charges (*u*), and are incapable of being sold or assigned so as to pass the interest of the party entitled during his lifetime, unless in the case of his bankruptcy or insolvency; but where that happens, they are to be repurchased by government at a valuation, and the value paid over for the benefit of creditors (*x*). The annual amount of annuity to be granted to any one person is not to be less than 4*l*. nor more than 30*l*. per annum (*y*); and no purchase can be made for the life of a person under the age of fifteen (*z*). Any inhabitants of a parish, forming themselves into a society for the purposes contemplated by the act, are entitled to claim its benefits, provided that the rector, vicar or minister of the parish for the time being, or a resident justice of the peace, be one of the trustees, and provided that there be no savings bank legally established in the parish under the provisions of 9 Geo. IV. c. 92 (*a*). But if there be a savings bank there of that description, a separate society for the purpose is unnecessary, and not authorized by the 3 Will. IV. c. 14; for in that case any two of the trustees or managers of the savings bank may contract for government annuities under the latter act, in favour of any person to whom they may think proper to extend the benefit (*b*), and who is either a depositor in the savings bank, or entitled in their opinion to become a depositor therein (*c*). And it is to be observed, that through whichever of these mediums annuities are purchased, all transactions relative to them are to be subject in either case (as far as possible) to the regulations made by 9 Geo. IV. c. 92, and 7 & 8 Vict. c. 83, as to savings banks (*d*).

4. *Loan societies*.—The law also affords protection to societies established for the purpose of advancing money

(*u*) Sect. 17.

(*x*) Sect. 16.

(*y*) Sect. 2; 7 & 8 Vict. c. 83.

(*z*) Ibid.

(*a*) Sect. 27.

(*b*) Sect. 1.

(*c*) Ibid.

(*d*) Sects. 26, 27; 7 & 8 Vict. c. 83, s. 21.

on loan to the industrious classes, and receiving back payment for the same by instalments, with interest. By 3 & 4 Vict. c. 110 (*e*) (which repealed a former act of 5 & 6 Will. IV. c. 23, as far as it related to the establishment of loan societies), forms of proceeding of a similar nature to those prescribed in the acts for savings banks and friendly societies are requisite to enable a society for advancing loans to avail itself of this act. Three copies of the rules must be transmitted to the certifying barrister; one of which he is directed to keep, another to return to the society, and the third to forward to the clerk of the peace for the county, city or borough in which the society is formed, in order that they may be laid by him before the general quarter sessions for the confirmation and allowance of that court (*f*). The legislature also directs the rules of the society to be inserted in a book, which is to be open at seasonable times for the inspection of the members; and it enacts that they shall be binding on all persons obtaining loans, or their representatives (*g*). The property of the society is vested in one or more trustees for its use, who are empowered to maintain and defend actions and other proceedings in their own name on account of the body at large (*h*); and the treasurer and other persons entrusted with the pecuniary affairs of the society must give to the trustees security for the faithful discharge of their duties (*i*).

These societies are entitled to issue debentures for money deposited with them (otherwise than by way of gift); and these, as well as all other notes and instruments given in pursuance of this act, are exempted from stamp duty (*k*). They are also placed on the same footing with savings banks, in the event of the death of a claimant intestate,

(*e*) Continued by 4 & 5 Vict. c. 55; 5 & 6 Vict. c. 5; 6 & 7 Vict. c. 41, and 7 & 8 Vict. c. 54, to 1st October, 1845.

(*f*) Sect. 4.

(*g*) Sect. 7. See *Brown v. Langley*, 4 M. & S. 466.

(*h*) Sect. 8.

(*i*) Sect. 12.

(*k*) Sects. 9, 14.

who is entitled to less than 50*l.*, the production of a will or letters of administration not being requisite (*l*).

The amount of loan which it is lawful for these societies to advance is limited to 15*l.* (*m*); and no second loan can be granted until the first is repaid. The society is permitted to receive, by way of discount, at the time of the loan, such interest as shall be specified by its enrolled rules, not exceeding 12*l.* per cent. per annum, and to receive the principal by instalments at such times and proportions as its rules specify, but so that the first repayment shall not be sooner than the 11th day from the time of the advance (*n*).

With respect to the recovery of loans (*o*), the act has provided a form of note to be signed by the borrower and two sureties; and upon failure in payment, the party liable may be summoned before any one of her Majesty's justices of the peace, who is empowered to levy what is due by distress and sale of the goods of the defaulter. The society (in the person of its treasurer) may also proceed against the party liable, in any county court or court of requests having jurisdiction; and, where the sum due happens to exceed the amount for which the court has jurisdiction, may nevertheless recover such part of the debt as that court can give judgment for, and it is willing to accept in lieu of the whole (*p*).

An abstract of the accounts of the society is to be made out yearly up to the 31st December, and sent during the month of January to the certifying barrister, and by him laid before both houses of Parliament (*q*).

5. *Benefit building societies*.—Lastly, the sanction and assistance of the legislature have been granted to societies established to raise a subscription fund by advances, from which the members shall be enabled to build or purchase

(*l*) Sect. 11.

(*m*) Sect. 13.

(*n*) Sect. 21.

(*o*) See *Timms v. Williams*, 3 Ad.

& El. N. S. 424; *Albon v. Pyke*, 4 Man. & Gr. 421.

(*p*) Sect. 18.

(*q*) Sect. 27.

dwelling-houses, or to purchase land,—such advances being secured to the society by mortgage of the premises so built or purchased. By an act of the 6 & 7 Will. IV. c. 32, societies of this description, upon the certificate and deposit of their rules, as required by the acts relative to friendly societies, are enabled to transfer shares without payment of stamp duty, and to effect reconveyances of the mortgaged property by a mere receipt for the money advanced, without incurring the expense of a formal instrument. They are also made subject in general to the various provisions of the acts relating to friendly societies.

In conclusion we may observe, that while these benefits are conferred upon the different species of institutions above enumerated, upon condition that their rules are duly certified and enrolled, one of them is partially extended even to institutions whose object is different, and which do not comply with that condition. For by 9 Geo. IV. c. 92, s. 27, any charitable or provident institution, or endowment whatever, if “for the benefit of the poor,” may be allowed to deposit its funds in the savings bank, at a rate not exceeding 100*l.* per annum, to the aggregate amount of 300*l.*

CHAPTER IV.

OF THE LAWS RELATING TO LUNATIC ASYLUMS,
AND THEIR MANAGEMENT.

WE had occasion in a former place to explain the general state of the law in reference to idiots and lunatics (*a*). But the numerous provisions made by the legislature, in regard to the safe custody and proper treatment of these persons, are of a nature to deserve more particular attention than we were able at that part of the work to bestow upon them; and we shall now advert to them more fully under the head of Lunatic Asylums.

By this term we understand all houses established for the reception of insane persons.

They are of various descriptions: some being established by law for the public benefit, under the denomination of County Lunatic Asylums; others instituted for the public benefit by the endowment of charitable donors; and others being private houses kept by individuals for their own profit.

We propose under the present head to treat, I. Of the provisions made by law for the establishment and maintenance of county lunatic asylums. II. Of the regulations as to the care and custody of insane persons in lunatic asylums in general.

I. County lunatic asylums are of modern origin, having been first established by 48 Geo. III. c. 96; the provisions of which, and of other subsequent acts, were repealed, and re-enacted, with amendments, by the 9 Geo. IV. c. 40. By this act, a majority of the justices at quarter sessions (not being less than seven) may at any time authorize the erec-

(*a*) Vide sup. vol. i. p. 440; vol. ii. pp. 283, 530.

tion of a lunatic asylum in their county (*a*), or an union with one or more of the adjacent counties, or with voluntary subscribers for the same purpose (*b*): and the expenses of such institutions, so far as they are not covered by voluntary contributions, are to be defrayed by county rates, and the management to be vested in a committee of *visitors* (*c*).

The purpose for which they are mainly designed is to receive the insane paupers or insane criminals of the county—classes of persons for whom it may be said in general that there is no other resource; particularly since the recent provision of the Poor Law Amendment Act, 4 & 5 Will. IV. c. 76, s. 45, by which it is made penal to confine insane persons, who are dangerous, more than fourteen days in any workhouse.

The provisions for the reception of these classes are briefly as follows: Any poor person *chargeable to a parish* within the county, and deemed insane, may, by 9 Geo. IV. c. 40, s. 38, be brought before two justices of the peace to be examined; and if upon such examination, assisted by a medical man, the justices are satisfied of the insanity, they may send him to the county asylum; or if there is none, then to any hospital or house licensed for the reception of insane persons; and may make order on the parish of his last settlement for the expenses of his conveyance and maintenance, and also of his removal when discharged (*d*). The same statute also authorizes (*e*) the same mode of proceeding in the case of lunatics *wandering about and at large*, unless they have some relative or friend willing to receive them. But where any lunatic of this description is found to have an estate more than sufficient to maintain his family, the justices may authorize the application of such surplus to defray the expenses incurred. By a subsequent statute, 1 & 2 Vict. c. 14, it is farther provided as to *lunatics meditating crime*, that if any person shall be

(*a*) Sect. 2.

(*b*) Sect. 4.

(*c*) Sect. 8.

(*d*) See 7 & 8 Vict. c. 101, s. 27,

as to the power of justices over the property of pauper lunatics.

(*e*) Sect. 44.

discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing an indictable crime, and two justices (assisted by a medical man) shall be satisfied that he is insane, or a dangerous idiot, they may order him to be conveyed to the county lunatic asylum; or if there be none in that county, then to some public hospital, or house duly licensed for reception of insane persons. And by 3 & 4 Vict. c. 54, it is moreover enacted with respect to *insane criminals*, that if any person in custody under sentence of death, transportation or imprisonment, or under any charge, or under any other than civil process, shall appear to be insane and his insanity shall be certified by any two justices of the peace of the county, city, borough, or place where such persons shall be confined, and also by two physicians or surgeons, a principal secretary of state may direct his removal to some county lunatic asylum, or other proper receptacle for insane persons, there to remain until a like certificate has been given that his reason is restored (*e*).

It is not, however, for the lunatic paupers of the respective counties, or for lunatic criminals, or lunatics meditating crime, that the county lunatic asylums are exclusively appropriated; for by the 9 Geo. IV. c. 40, s. 51, they are also made available, when the accommodation is sufficient, for the reception of insane patients, who are neither paupers nor criminals, or who being paupers, belong to other counties or places. In order to introduce such patients, however, the insanity must be certified by a medical man, an order must be obtained from a visitor, and an undertaking must also be signed by two substantial householders, or the minister and one of the churchwardens or overseers of the parish to which the insane person belongs, for the due payment of the expenses.

For the better government of these institutions, it is

(*e*) By 39 & 40 Geo. 3, c. 94, and 3 & 4 Vict. c. 54, persons acquitted on the ground of insanity may also be

ordered to be confined as the crown shall direct. And see *Ex parte Hill*, Coop. C. C. 54.

provided by the same statute (*f*), that the major part of the visitors present at a meeting duly summoned, and not being less than three, shall from time to time make such regulations as they may deem expedient for the management of the asylum, in which regulations shall be set forth the number and description of officers and servants to be kept, with their duties and salaries; and may also appoint and dismiss such officers, and from time to time fix the weekly rate to be paid for each person confined. The visitors are also required to send a yearly report of the patients to the secretary of state for the home department, to whom the act also gives authority to employ an inspector (*g*), to report to him upon the state of these establishments; an authority which, by a subsequent act of parliament, 2 & 3 Will. IV. c. 107, s. 49, is moreover extended to the lord chancellor, or to any other person entrusted by the crown with the jurisdiction in matters of lunacy (*h*).

II. As to the regulations, care, and custody of insane persons in lunatic asylums in general, they may be summarily stated as follows.

By 2 & 3 Will. IV. c. 107, amended by 3 & 4 Will. IV. c. 64, and 5 & 6 Vict. c. 87, every house for the reception of two or more insane persons (with the exception of the royal hospital of Bethlem, the royal military and naval hospitals, county lunatic asylums, and all hospitals or institutions supported wholly or in part by charity) must be licensed (*i*); and in general no such persons can be legally received in a house so licensed without a written order from the person sending him, and a medical certificate of two physicians, surgeons, or apothecaries, in such form as prescribed by the acts (*k*); nor can even a single insane

(*f*) Sect. 30.

(*g*) Sect. 57.

(*h*) The Royal Hospital of Bethlem is expressly excepted from the provisions of this act. Sect. 58.

(*i*) See *Budd v. Foulks*, 3 Camp. 404.

(*k*) 2 & 3 Will. 4, c. 107, s. 27. *R. v. Jones*, 2 B. & Ad. 611.

person be legally received or taken charge of in an unlicensed house without such order and certificate, unless by his guardian or relative acting gratuitously, or by his committee, appointed by the lord chancellor, or other person entrusted by the crown with the care of lunatics (*l*). But in the case of pauper lunatics the order is to be under the hand and seal of a justice of the peace, or signed by the officiating clergyman and one of the overseers of the parish to which he belongs, and the medical certificate (*m*) is to be signed by one physician, surgeon, or apothecary. The licences in question are to be granted annually in London and Westminster, and many of the suburban parishes, by a board of persons called the "Metropolitan Commissioners in Lunacy" (*n*); in the country, by the justices at quarter sessions (*o*); and by the acts just mentioned many provisions are made, but of a kind too minute and specific to be particularly detailed in this place, for the effectual superintendence of licensed houses, among which are comprised, *inter alia*, enactments that the keepers of such houses shall constantly report the admission, death, removal, or escape of patients (*p*); that the houses shall be provided with proper medical attendance (*q*); that they shall be frequently visited and inspected by the metropolitan commissioners, and by visitors appointed in the country by the magistrates at quarter sessions (*r*); that annual reports shall be made by the visitors to the metropolitan commissioners, and by the metropolitan commissioners to the lord chancellor, on the state of the houses by them respectively licensed (*s*); and that any persons detained therein without sufficient cause, with the exception of persons found lunatic under a commission, or con-

(*l*) 2 & 3 Will. 4, c. 107, s. 46.

(*m*) Sect. 29.

(*n*) Sect. 3.

(*o*) Sect. 10.

(*p*) Sects. 30, 31, 32; 5 & 6 Vict.

(*q*) 2 & 3 Will. 4, c. 167, ss. 33, 34.

(*r*) Ibid. ss. 35, 36, 38, 39, 42, 48, 49; 5 & 6 Vict. c. 87, s. 7—19.

(*s*) 2 & 3 Will. 4, c. 107, ss. 44,

45; 5 & 6 Vict. c. 87, ss. 8—12.

c. 87, s. 27.

fined by order of the secretary of state for the home department, may be set at liberty by the metropolitan commissioners or visitors (*t*).

Besides these provisions in regard to licensed mad houses, the metropolitan commissioners are moreover directed, by the 5 & 6 Vict. c. 87, s. 30, to visit once in every year the county lunatic asylums, and to report as to their condition, system, and regulations. They are also liable to be sent by the lord chancellor, or the principal secretary of state for the home department, to investigate the condition of the royal military and naval hospitals, and all other public asylums for insane persons, with the exception only of the Royal Hospital of Bethlem, and to report as to the state and condition thereof respectively, and the system of treatment therein adopted (*u*).

In addition to all which regulations, we may notice, lastly, the provisions of 3 & 4 Will. IV. c. 36, and 5 & 6 Vict. c. 84, applicable only to the particular case of persons found idiot or insane under an inquisition in the nature of a writ *de lunatico inquirendo*; by which it is enacted, that the lord chancellor may appoint three persons, two of whom shall be physicians, and one a barrister of five years' standing, to be visitors for superintending, inspecting, and reporting upon the care and treatment of all persons so circumstanced; and that for this purpose there should be joined with them the "Commissioners in Lunacy," being two judicial persons lately appointed for the discharge of all the duties, generally, under commissions in the nature of writs *de lunatico inquirendo*.

(*t*) 2 & 3 Will. 4, c. 107, s. 41;
5 & 6 Vict. c. 87, s. 16—19.

(*u*) Sect. 38. *Ex parte Chambers*,
1 Ves. jun. 296.

CHAPTER V.

OF THE LAWS RELATING TO GAOLS.

ANOTHER subject on which very anxious and elaborate attention has been repeatedly bestowed by the legislature, is that of gaols.

It is a principle of the common law, founded on a due regard to the public liberty and welfare, that a gaol can be erected only by the authority of parliament (*a*); and the same policy has also established the doctrine that a gaol when once erected belongs in every instance to the sovereign (*b*); being thus placed under the general control and protection of the same executive power from which emanates, in contemplation of law, the whole administration of civil and criminal justice.

With respect to the immediate care and superintendence of gaols, they are vested in some particular cases, by immemorial usage, in the lords of franchises (*c*), or privileged jurisdictions, but these instances are few; and by the general effect of the statute law on this subject they belong in other cases to the sheriffs of the counties in which the gaols are respectively situate (*d*). The actual keeper or gaoler is in contemplation of law only the sheriff's deputy, and if he negligently suffers a prisoner to escape, the sheriff, as his principal, will be responsible (*e*). The

(*a*) 2 Inst. 705; *R. v. Earl of Exeter*, 6 T. R. 373.

(*b*) 2 Inst. 589. The lands purchased for a prison or a court-house are vested in the persons or body corporate to whom the conveyance thereof shall be made, in trust for the public purpose; see 5 & 6 Vict. c. 98, s. 1.

(*c*) 2 Inst. 598; 1 Hale, P. C. 598; Bac. Ab. (Gaol) B.

(*d*) 14 Edw. 3, st. 1, c. 10; 19 Hen. 7, c. 10; 4 Geo. 4, c. 64, s. 6.

(*e*) 1 Hale, P. C. 597; 2 Hawk. c. 19, ss. 27, 29; *R. v. Fell*, 1 Ld. Raym. 424. As to the liability of the sheriff in general, vide sup. p. 26.

gaoler himself, however, is punishable for any official misconduct, and that by fine and imprisonment, and in general forfeiture of office. In the case indeed of his voluntarily permitting the escape of a felon, he becomes implicated in his crime (*f*).

There is a species of gaol which does not fall under the sheriff's charge; but is governed by a keeper wholly independent of that officer. It is termed, by way of distinction from the gaol properly so called or common gaol, a House of Correction, or (in the city of London) a Bridewell (*g*).

These houses of correction (which were first established, as it would seem, in the reign of Elizabeth) were originally designed for the penal confinement (after conviction) of paupers refusing to work, and other persons falling under the legal description of *vagrant* (*h*). And this was at first their only application; for in other cases the common gaol of the county, city, or town in which the offence was triable, was (generally speaking) the only legal place of commitment (*i*). The practice however in this respect was to a certain extent altered in the reign of George I. when "vagrants and other persons charged with small offences" were for the first time allowed to be committed to the house of correction for safe custody before conviction (*j*); and at a subsequent period it was provided, that as to vagrants the house of correction should be the *only* legal place of commitment (*k*). The uses however of a gaol of this description have been lately carried much farther. For by 5 & 6 Will. IV. c. 38, ss. 3, 4, reciting that great inconvenience and expense had been found to result from the practice of committing to the common gaol, where it

(*f*) R. v. Fell, 1 Ld. Raym. 424. As to the liability of gaolers for abuses committed, vide *Yorke v. Chapman*, 10 A. & E. 207; S. C. 11 A. & E. 813; 32 Geo. 2, c. 28.

(*g*) Jacob, Dict. tit. House of Correction; Style, 57. As to *Bridewell*,

see Strype's Stow, lib. 5, ch. 30.

(*h*) 39 Eliz. c. 4; Jacob, Dict. in tit.

(*i*) 5 Hen. 4, c. 10; 23 Hen. 8, c. 2; 6 Geo. 1, c. 19.

(*j*) Ibid. s. 2.

(*k*) 4 Geo. 4, c. 64, s. 7.

happens to be remote from the place of trial, it is enacted, that a justice of the peace or coroner may commit for safe custody to any house of correction situate near the place where the assizes or sessions are to be held, and that offenders sentenced in those courts to death, transportation, or imprisonment, may be committed, in execution of such sentence, to any house of correction for the county.

The erection, maintenance, and regulation of gaols are provided for by certain acts of parliament, of which the 4 Geo. IV. c. 64, is the principal (*l*). These acts, which apply generally to all gaols (subject only to a few exceptions), provide (among other things) that at the expense of every county in England and Wales there shall be maintained one common gaol (*m*); and at the expense of every county or division having a distinct commission of the peace, at least one house of correction (*n*); the jurisdiction as to maintaining and visiting these prisons being vested in the justices of the peace in quarter sessions assembled, or (in the case of separate divisions) in a court of gaol sessions, of which the justices of each division shall be members (*o*). Powers are besides given to the justices at quarter sessions to direct gaols (where wanting) to be built, or those already existing to be rebuilt, altered, or repaired, as occasion may require (*p*); the expenses thereby incurred, as well as those attending the maintenance of the prisoners, being defrayed

(*l*) As to 4 Geo. 4, c. 64, see *R. v. Cope*, 6 A. & E. 226; see also as to prisons, 5 Geo. 4, cc. 12, 85; 6 Geo. 4, c. 40; 7 Geo. 4, c. 18; 5 & 6 Will. 4, c. 38, and c. 76, s. 114, &c.; 6 & 7 Will. 4, c. 105; 7 Will. 4 & 1 Vict. c. 78, s. 37; 2 & 3 Vict. c. 56; 3 & 4 Vict. c. 25; 5 & 6 Vict. cc. 53, 98; 7 & 8 Vict. c. 50. The former acts are almost all recited in 4 Geo. 4, c. 64, and are (for most purposes) repealed by that act

(*m*) As to the particular case of the gaol of Newgate, which, though in

London (a county in itself), is nevertheless a gaol for the county of Middlesex, see *R. v. Cope*, 6 A. & E. 226.

(*n*) 4 Geo. 4, c. 64, s. 2.

(*o*) *Ibid.* s. 4; 5 Geo. 4, c. 12, s. 1. By 7 Will. 4 & 1 Vict. c. 78, s. 41, all county gaols, courts, &c., though locally included within the boundaries of a city or borough, under 6 & 7 Will. 4, c. 103, shall be nevertheless considered as still under the exclusive jurisdiction of the county.

(*p*) 4 Geo. 4, c. 64, s. 45; 5 & 6 Will. 4, c. 76, s. 116.

by the means of rates assessed on the county (*q*). Similar powers as to building, enlarging and repairing gaols are also given, as regards boroughs, to the town councils of such boroughs (*r*), and they are authorized to borrow money for those purposes (*s*) ; and it is enacted in favour of places too small to afford a separate gaol, that boroughs may contract with counties for the support and maintenance of town prisoners in the county gaol or house of correction (*t*), and may enter into similar contracts in certain cases with persons having charge of the gaol of any other borough (*u*). Provision is also made enabling the justices of any county, and the council of any borough, to agree with one or more other counties or boroughs towards building, altering or repairing any prison to be used as a *district* prison, and towards providing and maintaining a court-house for the district (*v*). And it is provided that every borough that has obtained a grant of a separate court of sessions of the peace, and that has not entered into any such contract or agreement as aforesaid, shall be bound to maintain at least one common gaol and one house of correction of its own (*x*).

It thus appears that the expenses connected with gaols are in general to be defrayed at the public charge of the county or town to which they respectively belong. In some cases, however, that obligation attaches, by antient custom or otherwise, to certain individuals or bodies corporate ; and it is to be observed that the general provisions above referred to have no effect in exempting such persons from their antecedent liability (*y*).

From the manner in which gaols are erected and maintained we may now pass to the consideration of the manner in which they are regulated. Every prison to which these

(*q*) 4 Geo. 4, c. 64, s. 68.

(*r*) 7 Will. 4 & 1 Vict. c. 78, s. 37.

(*s*) 5 & 6 Vict. c. 98, s. 3.

(*t*) 5 Geo. 4, c. 85, s. 1 ; et vide

7 Will. 4 & 1 Vict. c. 78, s. 42.

(*u*) 5 & 6 Will. 4, c. 76, s. 115.

(*v*) 5 & 6 Vict. c. 53, s. 1 ; 7 & 8 Vict. c. 50.

(*x*) 5 & 6 Vict. c. 98, s. 15 ; et vide 7 & 8 Vict. c. 93.

(*y*) 5 Geo. 4, c. 85, s. 15.

acts extend is to have a resident keeper, and resident matron to superintend the female prisoners, as also a visiting chaplain and surgeon(*z*), and to be visited three times a year by two or more justices of the peace appointed at the quarter sessions for that purpose(*a*). The visitors thus appointed are to make reports at every session as to the state of the prisons and prisoners within their jurisdiction(*b*); which are to be the basis of a general report from the quarter sessions, to be drawn up and transmitted annually by the chairman to a principal secretary of state, and to be afterwards laid before both Houses of Parliament(*c*). It is also provided that any justice of the peace within whose jurisdiction a gaol is situate, may enter and examine it and report upon abuses without being appointed a visitor(*d*).

With respect to the particular management of the prisoners the acts contain a variety of provisions too numerous and specific for insertion in this place. In addition to which permanent legislative regulations, others may from time to time(*e*) be laid down at the discretion of the proper authorities; that is (as regards the London prisoners), the court of mayor and aldermen of that city, and (as regards all others) the justices of the peace within whose jurisdiction the prison is situate(*f*). But it is provided(*g*) that no such additional rules shall be enforced until they shall be submitted to one of the principal secretaries of state, and his certificate as to their propriety shall be obtained. The subject of prison discipline indeed is placed still more directly under the control of her Majesty's government; for the clerks of the peace for every county and the chief magistrates of all towns are directed to transmit annually to one of the principal secretaries of state copies of all

(*z*) 4 Geo. 4, c. 64, ss. 10, 28, 33.

(*a*) Ibid. s. 16.

(*b*) Ibid. s. 23.

(*c*) Ibid. ss. 22, 24; 2 & 3 Vict. c. 56, s. 10.

(*d*) 4 Geo. 4, c. 64, s. 17.

(*e*) Preamble to 4 Geo. 4, c. 64.

(*f*) 4 Geo. 4, c. 64, s. 12; 5 & 6 Will. 4, c. 76, s. 116; 7 Will. 4 & 1 Vict. c. 78, s. 38.

(*g*) 5 & 6 Will. 4, c. 38.

regulations in force in their respective prisons, and also of such new and additional rules as may be proposed for the government thereof; and the secretary of state may make such alterations in the same or such additions thereto as he may think expedient—or in any case where no copies are transmitted he may certify what rules he may deem necessary for the government of the prison in respect of which such omission takes place—and the rules so certified shall take effect in law and supersede all others heretofore established by the subordinate authorities. A principal secretary of state is also empowered to appoint a sufficient number of proper persons as *inspectors* for every place of imprisonment in Great Britain; who are to visit and inquire into the state of these establishments, and make annual reports of the results of their inquiries to a principal secretary of state; which reports shall be afterwards laid before both Houses of Parliament (*g*).

Besides the ordinary gaols and houses of correction for counties and boroughs, there are some particular prisons which are the subject of separate and specific regulation. As—

1. The *Queen's Prison*; which is appropriated to the debtors and criminals confined under process or by authority of the superior courts at Westminster, the Marshalsea Court and Palace Court, and the High Court of Admiralty, and also to persons imprisoned under the bankrupt law (*h*). There existed till of late three separate gaols for the reception of such prisoners, viz. the Queen's Bench, the Fleet, and the Marshalsea Prisons. But by 5 & 6 Vict. c. 22, these are now consolidated into one. Towards the maintenance of the prisoners herein contribution is made out of the county stock or rates of the several counties and divisions in England and Wales (*i*);

(*g*) 5 & 6 Will. 4, c. 38, s. 7. s. 27.

(*h*) 5 & 6 Vict. c. 22. See as to Admiralty prisoners under sentence of Courts Martial, 5 & 6 Vict. c. 98, (i) 55 Geo. 3, c. 50; 5 & 6 Vict. c. 22.

and as to management it is subject to such regulations as shall be made from time to time by one of her Majesty's principal secretaries of state, and afterwards laid before parliament (*k*).

2. The *Milbank Prison* (*l*) (formerly called the Penitentiary at Milbank); for the reception of convicts under sentence or order of transportation, to be there confined until the sentence or order shall be executed, or until the convict shall be entitled to his freedom, or be removed to some other place of confinement (*m*). The justices of the peace have no authority over this prison (*n*), but it is placed under such of the inspectors of prisons, as shall be appointed for that purpose by one of the principal secretaries of state, and who are to be a body corporate, by the name of "The Inspectors of the Milbank Prison." These inspectors are to make regulations for the government thereof, subject to the approbation of a principal secretary of state, and to make yearly reports to such secretary, as to all matters relating to the prison or the convicts; which reports are to be afterwards laid before both houses of parliament (*o*). A principal secretary of state is also to appoint for the prison, a governor, a chaplain, a medical officer, a matron, and such other officers as may be deemed necessary (*p*).

3. The *Parkhurst Prison*; established in the Isle of Wight, for the confinement and correction of young offenders (*q*), male or female, as well those under sentence of transportation, as those under sentence of imprisonment. The rules for this prison are to be made by one of the principal secretaries of state, and afterwards laid before parliament, and they may include the infliction of

(*k*) 5 & 6 Vict. c. 22.

(*l*) 6 & 7 Vict. c. 26, repealing the former acts relating to the Penitentiary. Et vide 5 & 6 Vict. c. 98, s. 26.

(*m*) Sects. 12, 14.

(*n*) Sect. 8.

(*o*) Sects. 10, 11.

(*p*) Sect. 5.

(*q*) 1 & 2 Vict. c. 82. See 5 & 6 Vict. c. 98, s. 12.

corporal punishment on all such offenders. By the same authority, a governor, chaplain, surgeon, and matron, and all other necessary officers, are to be appointed. The prison is moreover to be visited by visitors, to be nominated by her Majesty's council, who, if they discover any abuses, are to report the same to a principal secretary of state, and shall also make a half-yearly report as to its state and condition.

4. The *Pentonville Prison* (*r*); provided for the confinement of male convicts under sentence or order of transportation (*s*), until they shall be transported or entitled to their freedom, or removed to some other place of imprisonment (*t*). It is under the government of commissioners, to be appointed by her Majesty's council, who are to form a body corporate, by the name of "The Commissioners for the government of the Pentonville Prison" (*u*), and power is conferred on them to hold meetings and make rules, subject to the approbation of a principal secretary of state (*v*), and with the like approbation to appoint officers, consisting of a governor, a chaplain, a medical officer, and such others as may be found necessary (*x*). And it is provided, that the commissioners shall from time to time appoint one or more of themselves to visit the prison during the intervals between their meetings, and if they think fit, may delegate power to such visitors to make orders in cases of pressing emergency (*y*). And farther, that the commissioners shall annually make reports to the secretary of state as to all matters relating to the prison, its discipline and management, which reports shall afterwards be laid before both houses of parliament (*z*).

(*r*) 5 & 6 Vict. c. 29.

(*s*) Sect. 14.

(*t*) Sect. 16.

(*u*) Sect. 11.

(*v*) Sect. 9.

(*x*) Sect. 6.

(*y*) Sect. 10.

(*z*) Sect. 13.

CHAPTER VI.

OF THE LAWS RELATING TO HIGHWAYS.

HIGHWAYS (or public roads) are those ways which all the subjects of the realm have a right to use; and the term (for some purposes at least) also applies to ways common to the inhabitants of some particular parish or district only, as in the case of church paths (*a*). The roads now in use have generally either existed by prescription (that is, from time immemorial), or have been constructed under the authority of local acts of parliament. They may be traced, however, in some cases, to a different origin; for the owner of any land may, if he thinks fit, dedicate a way over it to the use of the public; and if he long permits strangers to pass over it, at their free will and pleasure, and without molestation, a dedication of this kind will be presumed (*b*).

The liability to keep highways in repair (in whatever manner they may happen to have first originated) is of common right incumbent in general upon the parishes in which they respectively lie, but in some cases it attaches (by prescription) to particular townships, or other divisions of parishes; and occasionally to private individuals, bound *ratione tenuræ*, or in right of their estates, to repair some particular highway (*c*). Where an individual is liable to repair, he often claims, by grant or prescription, a toll of that species called toll thorough; or (where the soil is his)

(*a*) See the Highway Act, 5 & 6 Will. 4, c. 50, s. 5.

(*b*) As to highways by dedication, vide *Barraclough v. Johnson*, 8 A. & E. 99; *Surrey Canal Company v.*

Hall, 1 Man. & G. 392.

(*c*) 3 Geo. 4, c. 126, s. 107; 5 & 6 Will. 4, c. 50, s. 62; *R. v. Eastington*, 5 A. & E. 765; *R. v. Heage*, 1 A. & E. N. S. 128.

toll traverse (c). The case of bridges is differently provided for. The expense of maintaining these is defrayed indeed (like that of roads) by the public, this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio* (d). But it is incumbent not on the parishes, but on the counties at large, in which the bridges are situate (e). And where a parish is bound by prescription (as is sometimes the case (f)) to repair a bridge, there is a statutory provision, which gives effect to any contract between the county and the parish, for performing the repairs in future at the expense of the former, and relieving the latter from the charge. The liability of the county extended at common law, not only to the bridge itself, but to so much of the road as passed over it, and even to so much as formed its ends or approaches,—and by stat. 22 Hen. VIII. c. 5, the county was bound to repair 300 feet, either way from the bridge. And such is still the state of the law, as to all bridges built prior to the passing of the Highway Act, 5 & 6 Will. IV. c. 50. But by that act (g) it is provided, that in the case of all bridges thereafter to be built, the repair of the road itself passing over or adjoining to a bridge shall be done by the parish, or other parties bound to the general repair of the highway, of which it forms a portion; the county being still subject, however, to its former obligation, as regards “the walls, banks, or fences of the raised causeways, and raised approaches to any bridge, or the land arches thereof.”

The same act (h) contains provisions, designed to protect parishes from being subjected to unreasonable charge, in respect of ways dedicated to the public. It enacts, that

(c) Com. Dig. Toll; Willes, 115; Brett v. Beales, 10 B. & C. 508; Lord Middleton v. Lambert, 1 A. & E. 401; R. v. Marquis of Salisbury, 8 A. & E. 716; Same v. Same, 3 Nev. & P. 476.

(d) 1 Bl. Com. 357.

(e) Vincel's Ab. Bridges (A); R.

v. West Riding of Yorkshire, 5 Burr. 2594. And as to repair of county bridges see 4 & 5 Vict. c. 49. As to the repair of them *ratione tenuræ*, Baker v. Greenhill, 2 Galo & D. 435.

(f) R. v. Hendon, 4 B. & Ad. 62.

(g) Sect. 21.

(h) Sect. 23.

no road made at the expense of any individual, or body corporate, shall be deemed a highway which the parish is liable to repair, unless three calendar months' notice shall be given to the parish surveyor, of an intention to dedicate such road to the public (*i*). Upon notice being so given, a vestry is to be called to consider whether the road is of sufficient utility to justify its being kept in repair by the parish, and in the event of the vestry holding the negative, the justices, at the next special sessions for the highways, are to determine the matter. Other provisions are added, the object of which is to ensure that the road shall be originally constructed in a proper and substantial manner, before the expense of repairing it is cast upon the parish (*k*).

Any parish, county, or other party bound to repair a road or bridge, and neglecting the duty, is liable at common law to an indictment (*l*).

Though the maintenance of all the highways in the kingdom is legally chargeable, either upon the parishes through which they respectively pass, or on some particular district or individual, the expense of the most frequented and important roads is nevertheless chiefly defrayed by other means. These are kept in order (and many of them were originally constructed) under the authority of local acts of parliament, called *Turnpike Acts*, by which the management of such roads is usually vested, for a certain term of years, in trustees or commissioners, who are empowered to erect toll-gates, and to levy tolls from passengers, as a fund for defraying the expense of repairs or improvements. There is thus a distinction between *highways in general* and *turnpike roads*. It is to be understood, however, with respect to the latter, that the collection of toll does not supersede the other means provided by law, for maintaining highways. If a

(*i*) As to the liability before this statute, see *R. v. Leake*, 5 B. & Ad. 469.

(*k*) *R. v. Leake*, 5 B. & Ad. 469.

(*l*) *Viner's Ab. Bridges* (B).

turnpike road or bridge is allowed by the trustees to fall out of repair, the parishes or other parties who would have been bound to make it good, supposing it not to have become the subject of a turnpike trust, are still, in general, liable to that obligation (*m*). But they may be exempt from it under particular circumstances; for the trustees of a turnpike road may, in certain cases, enter into contract with such parties, and undertake to repair exclusively out of the trust (*n*); and where any contract of this description is in force, the persons originally liable are of course discharged from all responsibility. The turnpike trusts are very numerous, but there is one which, from its importance, deserves a specific notice. It is that of the "turnpike roads of the metropolis, north of the Thames," the different trusts of which were consolidated into one by 7 Geo. IV. c. cxlii. amended by 10 Geo. IV. c. 59.

With respect to those highways, or parts of highways, which pass through, and form the streets of towns, we may observe that they are generally the subject of distinct provision, under acts of parliament of another description, usually called *Paving Acts*, among which, we may notice particularly the 57 Geo. III. c. xxix. (*o*), for paving and regulating the streets of the metropolis (*p*). There are also acts in force with respect to the city of London in particular, containing provisions for the prevention of the misconduct of drivers of carriages, and regulating the loads of carts and waggons, and the construction of their wheels (*q*).

Having thus taken some view of the general state of the law relative to public roads or highways, we propose now

(*m*) 7 & 8 Geo. 4, c. 24, s. 17; 3 Geo. 4, c. 126, s. 110; 4 & 5 Vict. c. 59; *R. v. Netherthong*, 2 B. & A. 179; *Bussey v. Storey*, 4 B. & Adol. 109.

(*n*) 3 Geo. 4, c. 126, ss. 106, 107, 108.

(*o*) Called *Angelo Taylor's Act*. As to this statute see *Filbey v. Combe*, 2 Mee. & W. 677; *R. v. Halls*, 3 Ad. & El. 494; *Loveridge v. Hod-*

soll, 2 B. & Adol. 602.

(*p*) See 5 & 6 Will. 4, c. 50, ss. 112, 113; *R. v. Halls*, 3 Adol. & El. 494.

(*q*) These are the 1 Geo. 1, st. 2, c. 57; 6 Geo. 1, c. 6; 18 Geo. 2, c. 33, 24 Geo. 2, c. 43; 30 Geo. 2, c. 22; 11 Geo. 3, c. 51. Some of these acts are repealed by 5 & 6 Will. 4, c. 50, s. 1, except so far as regards the City of London.

to notice the particular practical provisions applicable to the several classes—I. Of highways in general. II. Of turnpike roads.

I. *Highways in general.* These are regulated by the Highway Act 5 & 6 Will. IV. c. 50, (amended by 4 & 5 Vict. cc. 51, 59,) which has repealed (*r*) all former enactments on the subject (*s*), and is applicable to all highways whatever, except turnpike roads, and roads, pavements or bridges falling under the provisions of local or personal acts of parliament (*t*)—a description which applies generally to the streets of towns.

The general plan of the act is to place highways under the care of surveyors, to be appointed for the respective parishes, subject to a superintending power to be exercised, in certain cases, by the justices of the peace, at special sessions to be holden for the highways; and to provide for the expenses connected with this subject, by a rate to be made and levied by the surveyor, upon the same principle (generally) as the poor rate. A surveyor of the highways is to be elected annually by the inhabitants in vestry assembled (*u*), and is to possess certain qualifications in point of property. When elected, he is compellable (unless he can show some grounds of exemption (*x*)) to take upon himself the office; but he is permitted to appoint a deputy, who is subject to the same responsibilities with his principal (*y*). The vestry may appoint the surveyor if they think proper, with a salary (*z*). Any two or more parishes may by mutual agreement and by consent of the justices of the peace at special sessions, or at quarter sessions (according to circumstances), be united into one district, for the purposes of the act, under

(*r*) R. v. Mawgan, 1 M. W. & H. N. S. 438; S. C. 8 A. & E. 496.

(*s*) Sect. 1.

(*t*) Sect. 113.

(*u*) Sect. 6.

(*x*) The same grounds of exemp-

tion that apply to an overseer of the poor, hold also as to a surveyor of the roads.

(*y*) Sect. 7, 8.

(*z*) Sect. 9.

the superintendence of a *district surveyor* (*q*). This officer, however, is to have no authority to make or levy the rate, but each parish must elect its own separate surveyor for that purpose (*r*). On the other hand, in large parishes the duties of the office of surveyor may be committed to more than one person. For where a parish has a population of more than 5,000, a board of surveyors may be appointed, to be called the “board for repair of the highways” in that parish; and they are authorized to appoint collectors, an assistant surveyor, a clerk and a treasurer (*s*).

The principal duty of the surveyor is to keep the parish highways in repair (*t*). Where any of them is out of order, complaint may be made to any justice of the peace, on the oath of one witness, and that magistrate may grant a summons thereon; but the charge is to be heard before the justices at special sessions for the highways; and if those justices either on their own view, or the report of an inspector to be appointed by them for the purpose, find that the highway is not in thorough and effectual repair, they may convict the surveyor in a penalty not exceeding 5*l.*, and order him to repair within a limited time. If the order is not complied with, he incurs the farther forfeiture of such sum as shall be judged adequate to the probable expense of the repairs required; and the money is to be applied accordingly to that purpose (*u*). The same course of proceeding, *mutatis mutandis*, is applicable to the case where a body corporate or private person is chargeable *ratione tenuræ*,—and if the highway is part of a turnpike road, the justices are to summon the treasurer, surveyor or other officer of the trust, and to make such order upon him as is already stated with regard to the parish sur-

(*q*) Sect. 13—15; R. v. King's Newton, 1 B. & Adol. 826.

(*r*) Sect. 16, 17; R. v. Bush, 9 Ad. & E. 820.

(*s*) Sect. 18.

(*t*) Sect. 6.

(*u*) Sect. 94. A surveyor cannot be convicted under this act for not removing nuisances himself, or for not fencing places that are dangerous. Morgan v. Leach, 10 Mec. & W. 558.

veyor (*x*). They have however no power to make an order in any case where the obligation of repairing comes into question (*y*). The only remedy where that occurs, is by indictment; which is to be preferred by order of the justices against the parish or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (*z*). The fine which may be imposed by the court upon the party convicted on such indictment, is to be paid to such person residing in or near the parish as the court shall direct; and is to be applied to the repair of the highway (*a*). If the highway which is the subject of indictment happens to be turnpike road, the fine, with the costs and charges thereof, is to be apportioned between the inhabitants of the parish and the trustees of the road, in such manner as to the court shall seem just (*b*).

The surveyor is to maintain the highways and gates thereon at such width as the act directs (*c*); and where the parish is more than three miles from the General Post Office of London, he is (by direction of the vestry or justices at special sessions) to put up direction posts (in certain cases) and boundary stones or posts (*d*). In order to enable him to maintain the roads, he may, with consent of the vestry, contract for the purchase and carriage of the materials; and (subject to certain restrictions and conditions) may take materials from any waste land or common ground *gratis* (*e*), or from private enclosed lands, upon making satisfaction to the owner (*f*).

Any injury whatever done to a highway, by which it is rendered less commodious to the passengers, is a public nuisance, and an indictable offence at common law; and any person is at liberty to abate the nuisance by removing

(*x*) Sect. 94.

(*y*) Ibid.

(*z*) Sect. 95.

(*a*) Sect. 96.

(*b*) 3 Geo. 4, c. 126, s. 110.

(*c*) 5 & 6 Will. 4, c. 50, s. 80.

(*d*) Sect. 24.

(*e*) Sect. 51.

(*f*) Sect. 54.

the materials (*g*). But by the Highway Act, the surveyor is specially required to remove all obstructions on the highways, and to impound cattle found straying thereon (*h*); and the act provides, that any person or persons committing such particular nuisances as it enumerates on highways, or (in general) doing injury to the same, or obstructing the free passage thereof, shall incur a forfeiture not exceeding 40s. (*i*).

Many provisions are also made to prevent the misconduct of drivers of carriages, who are subject in a variety of cases specified of misbehaviour (including the offence of furious riding or driving, or taking the wrong side of the road) to a penalty not exceeding 5*l.*, to be recovered before any two justices of the peace (*k*). And for the better discovering of offenders, the owner of every waggon, cart or other such carriage used on any highway, is required, under a penalty not exceeding 40s., to paint upon it, in such manner as the act specifies, his christian name and surname, or common style and title, and the place of his trade or abode, or the christian and surname and place of abode of a partner or owner thereof (*l*). While on this part of our subject, we may observe that all the powers vested in surveyors of highways, either as to the getting of materials or the removal of nuisances, belong equally to the surveyors of county bridges, and that bridges are subject as well as roads (whenever the nature of the case admits) to all the provisions of the Highway Act (*m*).

By the common law, the course of an antient highway cannot be changed without the king's licence, to be obtained after suing out a writ of *ad quod damnum*, and the finding of an inquisition thereon, that the alteration will not be prejudicial to the public (*n*). But by the Highway Act

(*g*) 1 Hawk. P. C. c. 76, s. 48, 61;
Marriott v. Stanley, 1 M. & Gr. 568;
Brook v. Jenney, 1 Gale & D. 567.

(*h*) Sect. 64—69, &c.

(*i*) Sect. 72, 74.

(*k*) Sect. 78.

(*l*) Sect. 76.

(*m*) Sect. 22.

(*n*) 1 Hawk. P. C. c. 76, s. 3;
Fowler v. Sanders, Cr. Jac. 446.

any two justices of the division may (subject to certain conditions and restrictions) order highways to be widened or enlarged (*o*). The inhabitants in vestry assembled may also direct the surveyor to apply to two justices of the division to examine a highway with a view to its being diverted or stopped up; and if a certificate of the justices in favour of such proceeding is sent to the quarter sessions, the justices there assembled are to make the order accordingly (*p*). But, in case of a diversion, the proceeding must be by consent of the owner of the lands through which the new highway is to pass (*q*). And in either case, any person who may think himself aggrieved by the proceeding, may appeal from the certificate of the justices to the quarter sessions before the order of that court is made (*r*); and the propriety of the stoppage or diversion is then to be determined by a jury (*s*).

The highway rate is chargeable upon the same property that is liable to the poor rate, and also on such woods, mines, quarries of stone, and other hereditaments, as have been usually rated to the highways (*t*). The rate is to be made and signed by the surveyor, and the mode of allowing, publishing, levying and recovering it, is the same as in the case of the poor rate (*u*).

The surveyor is to keep a weekly account of all money which has come to his hands, and of the manner of its application; and the account book is to be open, at all reasonable times, to the inspection of the rated inhabitants, without fee or reward (*x*). The surveyor is also at the end of his year to lay his accounts before the vestry, and

(*o*) Sect. 82.

(*p*) Sects. 84, 91.

(*q*) Sect. 85.

(*r*) Sect. 88; see *Selwood v. Mount*,
1 Ad. & El. N. S. 726.

(*s*) Sect. 89.

(*t*) Sect. 27. As to the application
of highway rates to repair of turnpike

roads, see 2 & 3 Vict. c. 81; 3 & 4
Vict. c. 98; 4 & 5 Vict. c. 59; *R.*
v. Berks (Justices), 8 Dowl. P. C.
727.

(*u*) See 43 Eliz. c. 2, s. 4; 17
Geo. 2, c. 38; 41 Geo. 3, c. 23; 54
Geo. 3, c. 170; 6 & 7 Will. 4, c. 63.

(*x*) 5 & 6 Will. 4, c. 50, s. 40.

before the justices of the peace at the special sessions for the highways; and the justices are required to examine him as to the truth of the accounts and to hear any complaints against the same (*y*).

These sessions for the highways are to be held not less than eight nor more than twelve times in the year; and at one of them the surveyor of each parish in the division is to make a return in writing, showing (among other particulars) the state of the roads and bridges under his care, and the nuisances and encroachments (if any) made thereon (*z*).

II. *Turnpike roads* (*a*).—These do not in general fall within the operation of the Highway Act (*b*), but are regulated primarily by the local acts relative to each particular road, which (though temporary) are renewed by the legislature from time to time as they are about to expire (*c*); and, in the next place, by statutes of a general description, applicable (with very few exceptions) to all turnpike roads (*d*), that is, all roads maintained by tolls and placed under the management of trustees or commissioners for a limited period of time (*e*). Of these general turnpike acts (which are numerous (*f*)), the 3 Geo. IV. c. 126 (amended by 4 Geo. IV. c. 95, and 4 & 5 Vict. c. 51,) is the principal.

(*y*) Sect. 44; and see 2 & 3 Vict. c. 40; *R. v. West Riding of Yorkshire (Justices)*, 1 Ad. & El. N. S. 624; *R. v. Lewis*, 1 Dowl. P. C. 530.

(*z*) Sect. 45.

(*a*) As to the legal meaning of the words "turnpike road," see *Northam Bridge and Road Company v. London and Southampton Railway Company*, 6 Mee & W. 428.

(*b*) 5 & 6 Will. 4, c. 50, s. 113.

(*c*) See the last of these acts, 7 & 8

Vict. c. 41.

(*d*) See 3 Geo. 4, c. 126, s. 4; 9 Geo. 4, c. 77, s. 20; 1 & 2 Will. 4, c. 25, s. 4; 4 Geo. 4, c. 95, s. 88; 9 Geo. 4, c. 77, s. 19.

(*e*) See 4 Geo. 4, c. 95, s. 90; 3 Chitty's Burn, 177.

(*f*) 2 D'Oyly's Burn's J. 880; 3 Geo. 4, c. 126; 4 Geo. 4, c. 95; 7 & 8 Geo. 4, c. 24; 9 Geo. 4, c. 77, s. 19; 1 & 2 Will. 4, c. 25; 2 & 3 Will. 4, c. 124; 3 & 4 Will. 4, c. 80; 4 & 5 Will. 4, c. 81.

The general effect of their leading provisions is as follows:—

Every trustee or commissioner of a turnpike road must possess a certain qualification in point of property (*g*)—must be sworn (*h*) to the due execution of his duties, and is prohibited (*i*) from holding any profitable office or contract, under the act of which he is trustee. Among them are included the justices of the peace of the different counties or divisions through which the road passes; who are *ex officio* commissioners (*j*).

They are not only to maintain and keep in repair the roads committed to their management, but to construct and maintain causeways at the sides of them for the use of foot passengers (*k*), to place milestones (*l*), and to widen, divert, or improve the roads as they shall think proper; and for the latter purpose they are empowered to purchase land, and (subject to certain conditions and restrictions) to turn the road over the property of individuals (*m*), and to take materials from the lands of private owners (*n*). To facilitate the performance of the duty relative to repairs, they are also empowered (if they think proper) to contract, by the year or otherwise, with any person for repairing or amending the road, or any bridges or buildings thereon (*o*).

The trustees are also bound to prevent or remove all nuisances and annoyances on the roads under their management, and they are to direct prosecutions for these offences, or any other offence, committed on the same (*p*). These offences are of various kinds, there being regulations in the turnpike acts (as well as in that relative to

(*g*) 3 Geo. 4, c. 126, s. 62.

(*h*) 4 Geo. 4, c. 95, s. 32.

(*i*) 3 Geo. 4, c. 126, s. 65.

(*j*) Ibid. s. 61.

(*k*) Ibid. ss. 111, 112; *Loveridge v. Hodson*, 2 B. & Ad. 602; *R. v. Higgins*, 5 B. & Adol. 555.

(*l*) 3 Geo. 4, c. 126, s. 119.

(*m*) 9 Geo. 4, c. 77, s. 9; 4 Geo. 4, c. 95, s. 65; 3 Geo. 4, c. 126, s. 84.

(*n*) 3 Geo. 4, c. 126, s. 97.

(*o*) 4 Geo. 4, c. 95, s. 78.

(*p*) 3 Geo. 4, c. 126, s. 133.

highways) inflicting pecuniary penalties in many specified cases of misbehaviour on the roads (*q*); and in order to detect offenders with more facility, the owners of every waggon or cart, or other such carriage to be used on a turnpike road, shall paint thereon, in such manner as required by the acts, his christian and surname, and the place of abode, or the christian and surname and place of abode of the principal partner or owner thereof, under a penalty not exceeding 5*l.* (*r*)

To meet the expenses incurred, the trustees or commissioners of every road are to erect toll gates (*s*) thereon, and the tolls are to be taken every day; the computation of which is to be from twelve at night to twelve the night following (*t*). They are to put up at every toll gate a table of tolls, and to provide toll tickets to acknowledge the receipt (*u*). No person is to pass without paying, and if a passenger liable to pay refuses, the collector may seize and distrain the beast or carriage, or any of the goods and chattels of the passenger, and in default of payment for four days sell the distress (*v*). If any dispute arises about the amount of the toll due, or the charges of a distress, it may be settled by any justice of the peace acting for the place where the toll gate is situate (*x*). Regulations are also made as to the weight and the construction of the wheels of waggons and carts, and carriages of the like description, used on turnpike roads. Those which have wheels of a particular construction, or exceed a certain weight, pay higher tolls (*y*). There are, on the other hand, various cases of exemption from tolls, of which we shall only notice the following:—No toll is taken on horses or carriages in attendance on her Majesty, or on any of the royal family, or returning therefrom (*z*): nor upon horses of offi-

(*q*) 3 Geo. 4, c. 126, ss. 114 to 121.

(*r*) 4 Geo. 4, c. 95, s. 15.

(*s*) 9 Geo. 4, c. 77, s. 5.

(*t*) *Ibid.* s. 16.

(*u*) 3 Geo. 4, c. 126, s. 37; 4 Geo.

4, c. 95, s. 28.

(*v*) 3 Geo. 4, c. 126, s. 39.

(*x*) *Ibid.* s. 40.

(*y*) 3 Geo. 4, c. 126, ss. 7, 9, 11, 12, 21; 4 Geo. 4, c. 95, ss. 2, 19.

(*z*) 3 Geo. 4, c. 126, s. 32; 4 Geo. 4, c. 95, s. 24.

cers or soldiers on duty (*a*), or carriages employed in or returning from the conveyance of materials for turnpike roads or highways, or (in general) of manure, or of agricultural implements, or of produce grown on the land of the owner, and not sold or going to be sold (*b*). An exemption is also allowed (where a turnpike gate is not within five miles of the Royal Exchange or Westminster Hall) to any person going to or returning from his proper parochial church or chapel, or his usual place of religious worship tolerated by law, on Sundays, or any day on which divine service is by authority ordered to be celebrated (*c*). Parishioners also are exempted in attending or returning from the funeral of persons who die and are buried in the parish in which the turnpike road lies; as also are rectors, vicars, or curates going or returning from their parochial duties, and persons going to, or returning from, the election of a member for the county in which the road is situated; and horses or other cattle, and vehicles of all descriptions, are also exempted which only cross the road or do not pass above a hundred yards thereon (*d*). It is to be observed, however, that any person claiming or taking an exemption, by fraudulent means, is liable to be convicted in a penalty not exceeding 5*l.* (*e*). The trustees are empowered to borrow money, as they may think proper, on the credit of the tolls, and may mortgage them, by way of security, to the lenders (*f*). They may also let them to farm for three years at a time (*g*), subject to such regulations as the acts prescribe—compound for them with any person or persons for a year at a time,—reduce them

(*a*) As to exemption of police and other officers, see 2 & 3 Vict. c. 47, s. 10; 3 & 4 Vict. c. 88, s. 1.

(*b*) 3 Geo. 4, c. 126, s. 32; 5 & 6 Will. 4, c. 18; 3 & 4 Vict. c. 51; *R. v. Adams*, 6 M. & S. 52.

(*c*) 3 Geo. 4, c. 126, ss. 32, 33;

Lewis v. Hammond, 2 B. & A. 206.

(*d*) 3 Geo. 4, c. 126, s. 32; 3 & 4 Vict. c. 33; *Harris v. Morrice*, 10 Mee. & W. 260.

(*e*) 3 & 4 Vict. c. 33, s. 36.

(*f*) *Ibid.* s. 81.

(*g*) *Ibid.* s. 55.

(by consent of creditors), or advance them to the full amount authorized by the particular act (*h*).

For their assistance in the performance of their duties, the trustees or commissioners of turnpike roads are empowered to appoint from time to time, such toll collectors, clerks, treasurers, surveyors, or other officers, as they think necessary, and also to remove them and appoint others in their stead, and out of the monies arising on the road to allow them such salaries and remuneration as they shall think proper (*i*). With respect to toll collectors it is provided, that every such person shall place in front of his toll house, his christian and surname, painted on a board, in such manner as the acts specify, and shall also tell his christian and surname to any person who shall demand the same on having paid toll, and shall give to every person making such payment a ticket with such particulars as the acts require. If he omits to comply with any of these regulations, or hinders any person from reading the board in front of his toll house, or gives a false name, he may be proceeded against before one justice of the peace, and incurs such forfeiture not exceeding 5*l*. as the justice shall think proper. He is punishable in like manner for permitting carriages to pass contrary to the regulations of the act as to the construction of wheels, or number of horses, or the names or descriptions to be painted thereon, without proceeding to enforce the penalties; or for allowing any carriage or passenger to pass without paying the toll; or demanding and taking a greater or less toll than is due (*j*), or any toll from a person exempt and claiming the exemption; or wilfully detaining any passenger who pays or tenders the legal toll; or making use of any scurrilous or abusive language to any trustee or passenger; or committing any other misconduct in his

(*h*) 4 Geo. 4, c. 95, s. 13; 3 Geo. 4, c. 126, s. 43; *R. v. Trustees of Bury and Stratton Roads*, 4 B. & C. 361.

(*i*) 4 Geo. 4, c. 95, s. 43.
(*j*) *R. v. Hants (Justices)*, 1 B. & Ad. 654.

office (*k*). But the only mode of proceeding against a collector for taking more toll than is due is that which is above specified; and he is not liable to an indictment for extortion or otherwise (*l*).

The trustees and commissioners of every road are also required annually to examine, audit, and settle the accounts of the different officers (*m*). An annual statement of the debt, revenues, and expenditure of the trust, is then to be transmitted to the clerk of the peace for the county, to be by him produced to the justices at quarter sessions, and registered among the records of that court (*n*). A similar statement is also to be transmitted to one of the principal secretaries of state; who is to cause it to be abstracted and to lay the abstract before both houses of parliament (*o*).

The last regulation of the general turnpike acts which we deem it necessary to notice is, that whenever the trustees of a road shall enter into a resolution to apply to parliament for a continuation of the act under which the road is regulated, or for the alteration or enlargement of their powers, or an increase of the tolls (*p*), their clerk is required to transmit a copy of such resolution to one of the principal secretaries of state, together with a copy of any special clauses, and a statement of any increased tolls which the trustees wish to have inserted in the new act (*q*).

(*k*) 4 Geo. 4, c. 95, s. 30; 3 Geo. 4, c. 126, s. 52.

(*l*) 4 Geo. 4, c. 95, s. 50.

(*m*) 3 Geo. 4, c. 126, s. 78.

(*n*) Ibid. ss. 78, 79.

(*o*) 3 & 4 Will. 4, c. 80, ss. 1, 5.

(*p*) But as to *decrease* of certain tolls, see 2 & 3 Vict. c. 46.

(*q*) 3 & 4 Will. 4, c. 80, s. 7.

CHAPTER VII.

OF THE LAWS RELATING TO TRADE AND
NAVIGATION.

IN attempting to exhibit in a condensed form the substance of the principal laws relating to the extensive subject of trade and navigation, we shall distribute our statement under the following heads :

- I. The laws relating to trade and navigation generally.
- II. Certain laws of trade regarding the East Indies and China in particular.
- III. The laws relating to ports or harbours, lighthouses, beacons and sea marks (*a*).
- IV. The laws relating to pilotage.
- V. The laws relating to fisheries.

I. The laws relating to trade and navigation generally.

These are in the main contained in the statutes 3 & 4 Will. IV. cc. 54, 55, 59, which form part of a series of eleven acts, comprising not only this subject, but also that of the *customs*,—a branch of law with which we have at present no concern, such notice of it having already been taken, as the nature of this work permitted, under the head of “The Royal Revenue” (*b*).

The statutes above enumerated relating to trade and navigation are to be considered as the representatives and successors of the celebrated Navigation Act in the reign of

(*a*) See also the laws to prevent depredations on the coast, and the exhibition of false lights, and the adjust-

ment of salvage, sup. vol. ii. pp. 558, 559.

(*b*) Vide sup. vol. ii. p. 544.

Charles the Second. Of this act Blackstone observes (*b*), that it was itself an improvement on an earlier system, which was [framed in 1650 (*c*), and with a narrow partial view, being intended to mortify our own sugar islands, which were disaffected to the parliament, and still held out for Charles the Second, by stopping the gainful trade which they then carried on with the Dutch (*d*); and at the same time to clip the wings of those over opulent and aspiring neighbours.] This original navigation law [prohibited all ships of foreign nations from trading with any English plantation without licence from the council of state. In 1651 the prohibition was extended also to the mother country, and no goods were suffered to be imported into England or any of its dependencies in any other than English bottoms, or in the ships of that European nation of which the merchandize imported was the genuine growth or manufacture. At the Restoration the former provisions were continued by 12 Car II. c. 18,] being the Navigation Act before referred to, [with this very material improvement, that the master and three-fourths of the mariners shall also be English subjects.]

In the reign of Geo. IV. both the statute last-mentioned and all the former navigation acts were repealed, and a new system introduced, which was embodied in the several acts 6 Geo. IV. cc. 109, 110, 114. But this has also in its turn been superseded (*e*) by the statutes of Will. IV. enumerated at the outset of this chapter.

The effect of these statutes of Will. IV. (as of the acts of navigation which preceded them) is generally to secure to British shipping and to British commerce, as distinguished from those of foreign countries, a certain amount of exclusive privilege, and that both as regards the mother country and her colonies. In order to understand their provisions, it will be proper, first, to consider

(*b*) 1 Bl. Comm. 418.

(*c*) Scobell, 132.

(*d*) Mod. Univ. Hist. xii. 289.

(*e*) See 3 & 4 Will. 4, c. 50 (the repealing act).

what constitutes, according to those acts, the character of a "British ship."

It is required then, by 3 & 4 Will. IV. c. 54 (*f*), that in order to claim this character, a ship should in general be duly *registered* (*g*), and *navigated* as such. And of these requisites in their order.

1st. As to *registration*,—the provisions are too minute and numerous to be fully stated. It will be sufficient to mention such as appear to be of principal importance. By 3 & 4 Will. IV. c. 55, it is provided that the ship must not only be *registered*, but such *certificate of registry* must also be obtained as in the act described (*h*); that for these purposes she must be wholly of the build of the United Kingdom, or the Isle of Man, Guernsey or Jersey, or some of the colonies or territories in Asia, Africa or America, Malta, Gibraltar, or Heligoland, which belong to the crown of this realm at the time of the building,—or must be a ship condemned as prize of war, or under the laws relating to the slave trade (*i*), and belonging to subjects of the crown duly entitled to be owners of registered vessels (*j*); that the owner or owners must be a subject or subjects of Great Britain (*k*); and that a declaration to that effect must be made by the owner, or a certain proportion of the owners (as the case may be), before the ship is registered (*l*); that every ship shall be deemed to belong to some port at or near which some or one of the owners who subscribes such declaration shall reside (*m*); that no registry shall (in general) be made in any other port

(*f*) Sect. 12.

(*g*) There are certain exceptions to the necessity of registration. They chiefly relate to boats under fifteen tons burthen, employed in coasting or inland navigation.—Sects. 13, 14.

(*h*) Sect. 2.

(*i*) But see *R. v. London* (Collector, &c. of Customs), 1 M. & S.

262.

(*j*) Sect. 5.

(*k*) Sects. 5, 12, 13. The only exception to this enactment is in favour of members of British factories, or agents for, or partners in, British houses, or members of the Levant Company.

(*l*) Sect. 13.

(*m*) Sect. 11.

or place than that to which the ship so belongs (*n*); and that whenever the original owner or owners shall have transferred all his or their shares, or in case she is so altered as not to correspond with the particulars stated in the certificate of registry, the ship shall be registered *de novo* (*o*); that the registration shall be made, and the certificate thereof granted, by the person who, according to the part of the world in which the ship is to be registered, is authorized by the statute to act in that behalf (*p*); that the certificate of registry shall set forth (from the information of the subscribing owner or owners) the names, occupation and residence of such owners, the proportions in which they are severally interested (such proportion being required by the act to be always some integral sixty-fourth part of the whole (*q*)), the name of the ship, of the port to which she belongs, and of her master; her tonnage (*r*), and when and where she was built; and shall also set forth (from a certificate to be furnished by a surveying officer) her build, rigging and dimensions (*s*). It is also provided that no greater number than thirty-two persons shall be entitled to be legal owners, at one and the same time, of any ship, as tenants in common (*t*), or to be registered as such (*u*); that as often as the property of any ship, or any part thereof, belonging to any British subject, shall, after registry, be sold to any other subject or subjects, the same shall be transferred by bill of sale or other instrument in writing (*v*), containing a recital of the certificate of registry, and that otherwise such transfer shall not be valid in law or equity (*w*); and that no such instrument shall be

(*n*) Sect. 10.

(*o*) Sects. 11, 28.

(*p*) Sect. 3.

(*q*) Sect. 32.

(*r*) As to the manner of ascertaining the tonnage, see 5 & 6 Will. 4, c. 56; 5 & 6 Vict. c. 47, s. 39; and 6 & 7 Vict. c. 84, s. 22.

(*s*) 3 & 4 Will. 4, c. 55, s. 2.

(*t*) Ex parte Young, 2 Ves. & B.

242.

(*u*) Sect. 33.

(*v*) As to assignment of freight, see Mestaer v. Gillespie, 11 Ves. jun. 636.

(*w*) Sect. 31. See Westerdell v. Dale, 7 T. R. 306; Biddell v. Leader, 1 B. & C. 327.

valid to pass the property in the ship, or any share thereof, or for any other purpose, until it shall have been produced to the proper officers for registration, nor until they shall have entered the name, residence and description of the vendor or mortgagor (or of each, if more than one), the number of shares transferred, the name, residence and description of the purchaser or mortgagee (or of each, if more than one), and the date of the instrument, and of its production (*x*). The officers are also required (unless the ship is about to be registered *de novo*) to indorse these particulars on the certificate of registry, when produced to them for that purpose (*y*). But it is provided, that as soon as the particulars aforesaid shall have been so entered by the officers of registry, the instrument shall be deemed valid and effectual to pass the property; and for all other purposes, except as against such subsequent purchasers and mortgagees as shall first procure the indorsement to be made on the certificate in manner in the act provided (*z*); its intent being, that where several purchasers or mortgagees appear to claim the same property or security, the priority between them shall depend, not on the time when the particulars of the bills of sale are entered, but the time when the indorsement is made on the certificate of registry (*a*).

2. As to the requisite that a British ship must be duly *navigated*, it is enacted by 3 & 4 Will. IV. c. 54, that in general she must be navigated during the whole of every voyage, in every part of the world, by a master who is a British subject, and by a crew whereof three-fourths at least are British seamen (*b*). But persons who have served

(*x*) Sect. 34.

(*y*) Ibid.

(*z*) Sect. 35.

(*a*) Sect. 36. See *Mestaer v. Atkins*, 5 Taunt. 381; *Bowen v. Fox*, 10 B. & C. 41; *Hassack v. Masson*, 4 Moore, 361.

(*b*) Sect. 12. In coasting voyages

the *whole* crew must be British seamen. Ibid. No person is "a British seaman" within the meaning of this act, except natural born subjects of the realm, denizens, or persons naturalized; or except persons who have become such by virtue of conquest or cession of some newly-acquired

on board any ships of war, in time of war, for three years, are British subjects within the meaning of this act; and one British seaman for every twenty tons of the burthen is declared in all cases a sufficient proportion, though the number of other seamen exceeds one-fourth. The crown also is authorized by proclamation at any time to reduce the proportion of British seamen to be required by law (c).

Such are the requisites for giving a vessel the character of a "British ship." Let us now consider the advantages she obtains as such—which may be stated as follows.

By 3 & 4 Will. IV. c. 54 (amended by 3 & 4 Vict. c. 95), it is provided,

1st, As to the *import* trade.

That certain specified goods, being the produce of Europe, shall not be imported into the United Kingdom, to be used therein (d), except in British ships, or ships of the country of which the goods are the produce or manufacture, or from which the goods are imported (e).

That generally (and subject to certain exceptions) no goods of Asia, Africa, or America, shall be imported into the United Kingdom, to be used therein, in foreign ships, unless they be those of the country in Asia, Africa, or America, of which the goods are the produce or manufacture, and from which they are imported (f); and (subject to certain exceptions) shall not be imported *from Europe* into the United Kingdom, to be used therein, in any shipping whatever (g).

country, and have taken the requisite oath of fidelity or allegiance. But the natives of places within the limits of the East India Company are not on that account British seamen. Sect. 16.

(c) Sect. 20.

(d) But this, and the other restrictions of the act as to foreign ships, do not extend to goods imported from any place not being a British possession, to be *warehoused for exportation*

only. 3 & 4 Will. 4, c. 54, s. 21.

(e) Sects. 2, 5. But by 3 & 4 Vict. c. 95, her Majesty may, by order in council, relax this prohibition as to Austrian vessels in certain cases, and may also, as regards any foreign power, grant it the privilege of trading from particular ports to be named, though such ports shall not be within the dominions of such state.

(f) 3 & 4 Will. 4, c. 54, ss. 4, 5.

(g) Sect. 3.

That no goods whatever shall be imported into the United Kingdom from Guernsey, Jersey, Alderney, Sark, or Man, except in British ships (*h*).

That no goods whatever shall be imported into any British possessions in Asia, Africa, or America, in any foreign ships, except ships of the country of which the goods are the produce, and from which they are imported (*i*).

2ndly. As to the *export* trade.

That no goods shall be exported from the United Kingdom to any British possession in Asia, Africa, or America, nor to the Islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships (*k*).

And 3rdly. As to the coasting and intercolonial trade.

That no goods shall be carried coastwise from one part of the United Kingdom, or one part of any of the aforesaid islands or of the aforesaid possessions, to another; or from one of the aforesaid islands to another; or from one of the aforesaid possessions to another, except in British ships (*l*).

To which statement of the substance of the restrictions intended for the benefit of our shipping, we have only to add, that in case of their violation, by carrying on in vessels, not duly registered or navigated, such trades as the acts intend to confine to those of British character, both ships and cargo are, by 3 & 4 Will. IV. c. 54 (*m*), and c. 55 (*n*), liable to forfeiture, and the master to the penalty of 100*l*.

With respect to the intercourse between the colonies and foreign states, which is permitted (as above stated), subject to a certain qualification, it is farther regulated by 3 & 4 Will. IV. c. 59, amended by 5 & 6 Vict. c. 49. That intercourse, as regards all the British possessions abroad, is, by these acts, confined to the ships of foreign

(*h*) Sect. 6.

(*i*) Sect. 11.

(*k*) Sect. 7.

(*l*) Sects. 8, 9, 10.

(*m*) Sect. 22.

(*n*) Sect. 4.

countries, which, having colonial possessions of their own, shall grant the like privilege of trading to British ships, or which not having colonial possessions, shall place the commerce and navigation of this country, and its possessions abroad, upon the footing of the most favoured nation; or which, without satisfying these conditions, shall obtain from the sovereign in council a special grant of such privilege. As regards the British possessions in America (except in the case of exportation of the produce of the fisheries), the intercourse is also confined to certain ports in these colonies, called “free ports” (the number of which is capable of being extended by order in council (*o*)); and certain duties are imposed on imports into the British possessions in America, not being the growth of the united kingdom, to be applied by the local legislature to such uses as it may direct (*p*). But notwithstanding anything in these acts contained, the intercourse between foreign countries and the British possessions in or near the continent of Europe, or within the Mediterranean or in Africa, or the limits of the East India Company’s charter (except the possessions of the company), may be regulated by the sovereign in council, in such manner as shall from time to time appear expedient and salutary (*q*).

II. The laws of trade as regards the East Indies and China in particular.

It will be remembered, that we took occasion, in a former volume (*r*), to notice the peculiarity to which the trade with these countries was formerly subject, viz. that it belonged exclusively to the East India Company; and it was shown, that in 1833 all that remained of this monopoly was abolished by act of parliament. Immediately upon this abolition it was enacted, by 3 & 4 Will. IV. c. 93, that notwithstanding the former laws to the con-

(*o*) 3 & 4 Will. 4, c. 59, s. 2.

(*p*) Sect. 13.

(*q*) Sect. 81.

(*r*) Vide sup. vol. i. p. 104.

trary, any of the subjects of the realm might thereafter trade with any countries beyond the Cape of Good Hope, to the straits of Magellan (*s*); subject only to this proviso, that the commander of every ship arriving at any place under the government of the East India Company, shall, under the penalty of 100*l.*, deliver to the principal officer of the customs, or other authorized person, an accurate list and description of all persons on board his vessel (*t*).

Since then, it has been also provided, by 3 & 4 Vict. c. 56 (*u*), that it may be declared in council by the governor-general of India, that all ships built or to be built within the limits of the charter of the East India Company, being owned by subjects of her Majesty, for whom the governor has power to legislate, and belonging to any ports in the territories under the government of the company, shall be deemed British ships for all the purposes of trade within the said limits, including the Cape of Good Hope, and the territories and dependencies thereof. And the governor in council was also thereby empowered to make regulations concerning the registering, licensing, and generally for the trading, within the limits aforesaid, of such ships; and farther to make regulations for admitting to the privileges of British ships for trade within such limits, any ships belonging to native princes, or states in subordinate alliance, or having subsidiary treaties, with the company, or owned by such princes or such subjects or states,—and for granting them fit and convenient licences and passes.

With respect to China in particular, it was enacted by the before-mentioned act of 3 & 4 Will. IV. c. 93, that the crown should have authority to appoint three officers, called “superintendents” (*v*), to whom was to be committed the regulation of British trade and commerce to and from that country; and to create a court of justice,

(*t*) Sect. 2.

(*u*) Sect. 3.

(*u*) Sects. 3, 4.

(*v*) 3 & 4 Will. 4, c. 93, s. 5.

with criminal and admiralty jurisdiction, for the trial of offences committed by the subjects of the realm in China. But since the passing of this act, her Majesty having acquired the island of Hong Kong, and established a legislative council there, and appointed as governor of the island the officer invested with the office of chief superintendent, it was enacted by 6 & 7 Vict. c. 80, that it should be lawful for her Majesty, by commission, to authorize such superintendent, so long as he should be also governor of Hong Kong, to enact, with the advice of the said legislative council, all such laws as might be necessary for the good government of British subjects in China, or within any ship not more than 100 miles from China, and to enforce the execution of such laws by pains and penalties. The same power is also given to her Majesty in council; and it is enacted, that as soon as any such commission shall have been received at Hong Kong, so much of the act of 3 & 4 Will. IV. c. 93, as relates to the powers and authorities to be exercised by the superintendent, or to their regulation of trade and commerce, shall be repealed.

By a subsequent statute, 6 & 7 Vict. c. 84, reciting, that by the laws of navigation no goods can be imported into any British possession in Asia, Africa, or America, in any foreign ships, except ships of the country of which the goods are the produce, and from which they are imported, but that the enforcement of such enactment in the island of Hong Kong would be attended with great difficulty, it is enacted (*w*), that it shall be lawful for her Majesty in council to declare that goods, the produce or manufacture of any country, may be imported into Hong Kong from the same, or any other foreign country, in vessels belonging to the same or any other foreign country, and however navigated.

III. The laws relating to ports or harbours, lighthouses, beacons, and sea-marks.

And here—

1. As to ports or harbours.

The common law prerogative of the crown in respect to these has been explained in a former volume (*x*) ; and it is not intended to recur to that subject on the present occasion ; nor is it necessary to notice (farther than simply allude to) the many local acts of parliament, which have from time to time been passed for repairing and improving the harbours to which they respectively relate. Our business at present is with the acts of general regulation relative to ports and harbours ; among which may be noticed 1 Eliz. c. 11, and 13 & 14 Car. II. c. 11, s. 14, which enabled the crown, by commission, to ascertain the limits of all ports, and to assign proper wharfs and quays ; 19 Geo. II. c. 22, by which certain nuisances in harbours are restrained ; and 46 Geo. III. c. 153, by which it is provided that no pier, quay, or embankment, shall be erected in or adjoining to any public harbour in the United Kingdom, or any river immediately communicating therewith, so far as the tide flows up the same, without giving one month's notice of the intention to do so to the secretary of the Admiralty. But the principal statute now in force is 54 Geo. III. c. 159.

By this it is enacted, that the Lords of the Admiralty shall from time to time make such regulations as they shall think fit for the preservation of the royal moorings, and for the mooring, anchoring or placing all private ships of war, merchant vessels, and all other craft whatsoever, in all ports, harbours, and navigable rivers of the United Kingdom, so far as the tide flows and re-flows, in or near which there are any royal docks, arsenals, wharfs, or moorings, for the purpose of insuring safe and free ingress and egress to and from such docks, arsenals, wharfs and moorings ; and, to enforce such regulations, shall from time

(*x*) Vide sup. vol. ii. p. 521.

to time appoint proper persons, to be called “the king’s harbour masters” (*y*). The act also contains provisions prohibiting private ships from being fastened to the royal moorings, and regulations as to ships laden with gunpowder, as to keeping fires on board of private ships, or casting ballast or rubbish into harbours, and as to vessels sunk in harbours.

2. As to lighthouses, beacons, and other sea-marks.

The power of erecting and maintaining these is (as formerly shown) a branch of the royal prerogative (*z*). By 8 Eliz. c. 13, however, it is specially committed to the corporation of the Trinity House of Deptford Strond, which is a company of masters of ships, charged by various charters with providing for the increase of ships and mariners for the royal service. By 6 Geo. IV. c. 125 (*a*), the provisions of the act of Elizabeth are extended also to all vessels appointed to exhibit lights for the preservation of vessels at sea. By 6 & 7 Will. IV. c. 79, the Trinity House was farther empowered to purchase the existing interests of private persons in certain specified lighthouses, so as to place under their immediate authority all edifices of that description in England (*b*); and the lighthouse at Heligoland (*c*) was also vested in them; and it is provided that no new light, beacon, or sea-mark, should be placed without the sanction of the said company. Regulation is also made as to the manner in which the tolls of lighthouses are to be collected from ships; and it is enacted that the Trinity House may from time to time, upon the requisition, or with the consent of the king in council, remove and discontinue any lighthouses and erect others, and may

(*y*) Sect. 2.

(*z*) Vide sup. vol. ii. p. 523.

(*a*) Secta. 90, 91.

(*b*) The lighthouses on the coast of Scotland are under the control of the “Commissioners of Northern Lights” (appointed by 26 Geo. 3, c. 101); and those on the coast of

Ireland under that of the “Corporation for improving and preserving the Port of Dublin” (appointed by 52 Geo. 3, c. 115); 6 & 7 Will. 4, c. 79, s. 1. As to this corporation, see also 6 & 7 Will. 4, c. 117.

(*c*) Sects. 35.

direct the owners of kilns or furnaces, so kept as to be liable to be mistaken for lighthouses, to make the necessary alteration therein, so that such mistake may be in future prevented (*b*). And, lastly, by 1 & 2 Vict. c. 66, the lighthouse at Gibraltar is vested in the same company, and the powers given to them by the act of 6 & 7 Will. IV. are for the most part extended to the lighthouse at Gibraltar, and all other lighthouses not within the United Kingdom which shall be at any time vested in such company.

IV. The laws relating to pilotage.

The statutes in force on this subject are 6 Geo. IV. c. 125; 9 Geo. IV. c. 86; and 3 & 4 Vict. c. 68.

By the first of these acts (which is the principal one, and repeals all former provisions on the subject) it is enacted, that the corporation of the Trinity House of Deptford Strond shall grant annual licences to persons qualified, as in the act mentioned, to act as pilots in conducting vessels up and down the Thames and Medway and the adjoining channels, between Oxfordness and London Bridge, or from London Bridge to the Downs, or from the Downs westward as far as the Isle of Wight, or in the English Channel from the Isle of Wight up to London Bridge; and that all vessels within those limits, except as after mentioned, shall be conducted by pilots so licensed, and by no other person whatsoever (*c*). The same corporation is also required to appoint "Sub-commissioners of Pilotage," who shall license in the same manner qualified pilots at such ports and places in England as they may think requisite (except the liberty of the Cinque Ports, and such other places as may be otherwise specially provided for), to act within particular limits to be specified (*d*), to the exclusion of all other pilots whatsoever (*e*): and is moreover authorized to establish and alter, as circumstances may require, rates of

(*b*) Sect. 51.

(*d*) Sect. 5.

(*c*) Sect. 2.

(*e*) Sect. 7.

pilotage in relation to all services performed in any river, port or place, or on any coast, by any pilot licensed by the corporation (*f*), and also to make bye laws for the regulation of licensed pilots (*g*); such bye laws to be transmitted to the privy council and commissioners of the customs, and afterwards to receive the sanction of the Chief Justice of the King's Bench or Common Pleas (*h*).

With respect to the excepted liberty of the Cinque Ports, the act in like manner provides, that the lord warden of the Cinque Ports and constable of Dover Castle, or his lieutenant, shall license pilots, qualified as therein mentioned, for conducting vessels sailing from or by Dungeness up the rivers Thames and Medway to London Bridge and Rochester Bridge, and all the channels of the same, and from the south buoy of the Brake to the westward, as far as the west end of the Owers; and that all vessels within those limits, except as in the act mentioned, shall be conducted by pilots so licensed, and by no other persons whatever (*i*).

By another exception from the general jurisdiction, the Corporation of the Trinity House of Hull and Newcastle respectively, may also license qualified pilots to conduct ships in and out of any ports or places within their respective limits (*k*).

Among various other provisions, too minute for notice in this place, the act requires in general that all masters of vessels coming from the westward, and bound to any place in the Thames or Medway, shall, on the arrival of the vessel off Dungeness, and continually while within certain limits, display and keep flying the usual signal for a pilot to come on board, and shall facilitate any duly qualified Cinque Port pilot's getting on board accordingly, under penalty of forfeiting double the amount of pilot-

(*f*) Sect. 8.

(*g*) Sect. 11.

(*h*) Sect. 12.

(*i*) Sect. 14. As to the extent of the jurisdiction of the Cinque Ports,

see also 9 Geo. 4, c. 86.

(*k*) 6 Geo. 4, c. 125, s. 6; *Dodds v. Embleton*, 9 D. & R. 27; *Beilby v. Raper*, 3 B. & Ad. 284.

age (*l*); and that, on the other hand, no owner or master shall be answerable to any person for any loss which shall happen through the default or incapacity of the licensed pilot on board, or so long as no duly qualified pilot shall have offered to take charge of the vessel (*m*).

The authorities appointed by the act for granting licences to persons to act as pilots, are also respectively authorized to license vessels of such size and description as they think proper, for the purpose of having pilots constantly in attendance in such vessels at sea; and for the better support of such pilot-vessels, any number of licensed pilots may, by consent of the authorities, constitute a joint stock company for the providing and maintaining of such pilot-vessels (*n*). By 3 & 4 Vict. c. 68, it is also provided that every such pilot-boat or vessel, or any vessel belonging to a licensed pilot, shall be painted or tarred entirely black, except the name or other description required by law to be painted on such boat or vessel.

V. The laws relating to Fisheries.

We cannot, consistently with the design and necessary limits of the present work, attempt to detail the numerous provisions which our statute book contains in regard to fisheries. It will suffice to point out some of the principal features of our policy in relation to this subject.

And first we may remark, that a great variety of acts of parliament are in force for the protection of the breed of fish, and the prevention of any practices tending to destroy the spawn or fry (*o*). These are as follows: 13 Edw. I. st. 1, c. 47; 13 Ric. II. st. 1, c. 19; 17 Ric. II. c. 9; 2 Hen. VI. c. 15; 1 Eliz. c. 17; 3 Jac. I. c. 12; 30 Car. II. st. 1, c. 9; 1 Geo. I. st. 2, c. 18; 33 Geo. II.

(*l*) Sect. 19.

(*m*) Sect. 55. *Hammond v. Blake*,
10 B. & C. 424; *Chaney v. Payne*,
1 Ad. & El. N.S. 712; *R. v. Chaney*,
6 Dowl. P. C. 281; *Beilby v. Scott*,

7 Mee. & W. 93.

(*n*) Sect. 31.

(*o*) *Vide Mayor of Maldon v. Woolvet*, 12 Ad. & El. 13.

c. 27, s. 13, &c.; 58 Geo. III. c. 43; 7 & 8 Geo. IV. c. 29, s. 36; c. 30, s. 15.

Secondly, that the trade in fish, as regards the cities of London and Westminster, is regulated by certain acts passed for that special purpose; the general object of which is to secure a supply of fresh fish to those cities, and to prevent the forestalling of the same. The acts are 22 Geo. II. c. 49; 29 Geo. II. c. 39; 33 Geo. II. c. 27; 2 Geo. III. c. 15; 30 Geo. III. c. 54; 36 Geo. III. c. 118; 4 & 5 Will. IV. c. 20.

Thirdly, that persons employed in the fisheries in such manner and under such circumstances as defined by the statute 50 Geo. III. c. 108, are by that statute exempted from impressment.

Fourthly, that the importation in fishing vessels of fish of foreign taking (with the exception of certain kinds only) is by 5 & 6 Vict. c. 47 (*p*), prohibited altogether; and its importation in any other vessels is also prohibited, except in such as are regularly cleared out for a foreign port; and that when imported in such vessels as last mentioned, it is subject to duty on importation; but that fish of British taking (fresh or cured) may be imported and exported in all cases duty-free (*q*).

Fifthly, that acts have been of late years frequently passed enabling commissioners appointed for that purpose to sanction the advance of public monies, on loan, for the encouragement of the fisheries, as well as of public works and other national undertakings; the last of these acts was the 5 & 6 Vict. c. 9.

Sixthly, that bounties were formerly payable by act of parliament upon the taking and curing of fish of various descriptions, and on the vessels employed in various branches of the fisheries, but that the policy in this respect having been lately altered, these bounties are abolished by 1 & 2 Geo. IV. c. 79; 5 Geo. IV. c. 64; 7 Geo. IV. c. 34 (*r*).

(*p*) Sects. 4, 5.

(*q*) Tables annexed to same act.

(*r*) See 11 Geo. 4 & 1 Will. 4, c.

54.

Seventhly, that the fisheries of *Ireland* are now regulated by a recent act, 5 & 6 Vict. c. 106 (amended by 7 & 8 Vict. c. 108,) by which almost all the former statutes on that subject are repealed, and their provisions consolidated and amended. In the Irish fisheries, as regulated by this act, the principle of bounty (which as to those as well as the British fisheries had been previously abandoned (s)) is not revived.

Lastly, that a treaty was concluded in 1839 between her Majesty and the King of the French, defining the limits of exclusive fishery between the British Islands and France, and agreeing to appoint commissioners, consisting of an equal number of each nation, to prepare regulations for the guidance of the fishermen of the two countries in the interjacent seas. And that by 6 & 7 Vict. c. 79 (t), the said treaty was carried into effect, and the articles agreed upon by the said commissioners and annexed to the act, declared to be binding on all persons and to have the force of law, and various regulations made for their more effectual observance.

(s) 1 & 2 Geo. 4, c. 79; 5 Geo. 4, c. 64; 7 Geo. 4, c. 34.

Vict. c. 96, continued by 5 & 6 Vict. c. 63.

(t) See also the interim act, 2 & 3

CHAPTER VIII.

OF THE LAWS RELATING TO PESTILENCE AND
CONTAGION.

THE attention of the legislature has from the reign of James I. been at various times directed to the subject of pestilent and contagious disease, and to the establishment of such precautions as human knowledge and sagacity might devise, for averting its course or mitigating its effects.

The enactments which have been introduced in reference to this matter, have had in view the particular maladies of Plague, Cholera, and Small-pox.

1st. With respect to *Plague* various provisions were made by 1 Jac. I. c. 31. By this statute it was enacted, that if any person infected with the plague, or dwelling in any infected house, should be commanded by the mayor or constable, or other head officer of his town or place, to keep his house, and should wilfully and contemptuously disobey such direction, he should be enforced with violence, by the watchmen appointed, to obey such necessary command; and if any hurt ensued by such enforcement, the watchmen were not to be impeached. And farther, if such person so commanded to confine himself went abroad and conversed in company, if he had any infectious sore upon him, uncured, should suffer death as a felon; but if no such sore should be found upon him, should be punished as a vagabond, and, moreover, bound to his good behaviour.

The necessity, however, of these, or of any regulations adapted to an actual prevalence of this disease among us, has been long since at an end, no plague having by the blessing of providence been known in this island for more than 170 years past; and the statute of James, after re-

maining for so long a period dormant, was at length in the reign of her present Majesty repealed (a).

But besides the act of James above referred to, our statute book contains several others on the subject of the plague; the main object of which is not so much to regulate the conduct of infected persons during its prevalence, as to exclude it altogether from our population.

We here refer to the laws relating to *quarantine* (b), the term applied to that period of probation during which vessels arriving from countries infected with plague, or other contagious disorder, are restrained by law from general intercourse.

The first statute on the subject was 9 Ann. c. 2, which was followed by several others in the reigns of George I. and George II.; but at length all former provisions were repealed by 6 Geo. IV. c. 78, which consolidates the whole law now in force with respect to quarantine.

By this last mentioned statute it is enacted, that all vessels, as well of war as others, coming from any place, from whence the crown by the advice of the privy council shall have adjudged it probable that the plague or other infectious disease of a highly dangerous kind may be brought, and all vessels and boats receiving persons or goods out of the same, and all persons and goods on board the vessels so arriving, or so receiving as aforesaid, shall be liable to quarantine within the meaning of the act, and of any order or orders in council concerning quarantine; and shall be obliged to perform quarantine in such place or places for such time and in such manner as shall from time to time be directed by any order in council, notified by proclamation or published in the London Gazette; and until they shall have been discharged from such quarantine shall not come on shore, or be put on board any other vessel or boat, except in such

(a) 7 Will. 4 & 1 Vict. c. 91, s. 4.

(b) The earliest known regulations in the nature of quarantine laws are those contained in an edict of Jus-

tinian, A. D. 542. In modern times the example has been followed in all the principal countries of Europe.

cases, and by such licence, as the order in council may direct (*c*). And in case of breach of quarantine, either as to persons or goods, the offender is visited with heavy fine, and any person escaping from quarantine is besides punishable with imprisonment for six months (*d*). But, on the other hand, the privy council is empowered, if it shall think fit, to shorten in any case the period of quarantine, or absolutely release therefrom, any particular vessels, persons, or goods (*e*).

Every commander or other person having the charge of any vessel liable to the performance of quarantine, is also required, whenever he shall meet any vessel at sea, or be within two leagues of the coast or its adjacent islands, to hoist, and keep hoisted, such signal as required by the act, to denote that he is liable to the performance of quarantine, or (if the fact be so) that he has the plague or other highly dangerous and infectious disease on board (*f*); and every commander, or other person having the charge of any vessel coming from foreign parts, is also directed to give, to the pilot who shall go on board, a written paper containing a true account of the places where the vessel has traded or touched; and, if the vessel is not liable to quarantine in respect of place, a written paper containing a true account of the different articles composing the cargo; and, if, by any order in council made since his departure, such places or goods have been made liable to quarantine, the pilot is forthwith bound to give him notice thereof, and the commander shall thereupon hoist a signal according to the act; and the pilot is prohibited from taking such vessel into any port not specially appointed for performing quarantine (*g*).

Besides many other regulations too minute to be here set forth, it is farther provided, as to such sorts of goods and merchandize as are more especially liable to retain infection, and which shall be specified for that purpose by

(*c*) Sect. 2.(*e*) Sect. 6.(*g*) Sects. 11, 12.(*d*) Sects. 17, 26.(*f*) Sects. 8, 9,

any order in council, that as well such goods, if conveyed into any port or place in the united kingdom from any foreign country or place in any vessel whatever, as the vessel in which the same shall be conveyed, shall be liable to such regulations as the crown by any order in council shall make respecting the same (*g*). And power is moreover given to the lords of the privy council, or to any two of them, to make such order as they shall see necessary upon any unforeseen emergency, or in any particular case, with respect to any vessel and goods arriving and having any infectious disease on board, or arriving under any suspicious circumstances as to infection; although such vessels shall not have come from any place from which the crown has declared it probable that the plague or other disease may be brought (*h*).

A similar power is likewise committed to them in the case of any infectious disease or distemper breaking out in the united kingdom; and for cutting off communication between persons afflicted therewith, and the rest of the subjects of the realm (*i*).

This act also authorizes the privy council, as often as they see reason to apprehend that the yellow fever, or other highly infectious disorder, prevails on the continent of America or in the West Indies, to require that every vessel coming from or having touched at those parts shall come to an anchor at certain places to be appointed from time to time by the commissioners of customs, for the purpose of having the state of health of their crews examined, before such vessel can enter any port of the united kingdom. But such vessel shall not be liable to quarantine unless it be so specially ordered (*k*).

The crown is also enabled, if it shall happen that the united kingdom or the adjacent islands, or France, Spain, Portugal, or the low countries, shall be infected with plague or such disease as aforesaid, to issue a proclamation restraining all vessels under 100 tons from sailing out of

any port in the united kingdom, or the adjacent islands, until a bond be given with sufficient sureties against going to, or touching at, the place so infected, or having any intercourse therewith (*l*).

2ndly. As to *Cholera*.

The visitation of the kingdom by the spasmodic or Indian cholera, gave occasion in 1832 to the act 2 Will. IV. c. 10, by which the privy council were empowered to issue orders such as might appear expedient, with the view to prevent the spread of this fearful disease, or for the relief of persons afflicted thereby, or the interment of those who became its victims. And by the 3 & 4 Will. IV. c. 75, this act was continued until the end of the then next session of parliament. But at the expiration of that period the cholera had wholly disappeared, and the act was not farther continued, nor ever afterwards revived.

3rdly. As to *Small-pox*.

By 3 & 4 Vict. c. 29, intituled An Act to extend the Practice of Vaccination, (amended by 4 & 5 Vict. c. 32,) the guardians of parishes or unions, or the overseers of parishes where there are no guardians, are directed to contract (subject to the regulation of the poor law commissioners) with the medical officers of the parish, or other persons, for the vaccination of all persons there resident; and such medical officers, or other practitioners, shall report to the overseers or guardians, from time to time, the number of persons successfully vaccinated, with such farther particulars as the guardians and overseers, under direction of the poor law commissioners, may require; and any person who may produce, or attempt to produce, by inoculation or otherwise, the disease of small-pox in any person in England, Wales, or Ireland, shall be liable to be proceeded against, and convicted summarily before two or more justices of the peace in petty sessions, and for every such offence be imprisoned for a term not exceeding one month.

CHAPTER IX.

OF THE LAWS RELATING TO PUBLIC CARRIAGES AND
CONVEYANCES.

It has been the policy of the legislature of this country to exercise, over this department of social economy, merely a general supervision, and to trust to the enterprize of individuals or societies for providing for the welfare and convenience of the public in this important particular.

At an early period however it was found expedient to place the hackney coaches and chairs in and about the metropolis under strict control, both for the purpose of keeping in some tolerable order a very refractory race of men, and also of procuring an acceptable addition to the revenue, by compelling them to take out licences and to pay duties (*a*).

Other modes of locomotion have in later times been invented, the laws relating to which will also form a part of the subject of the present chapter, which may be conveniently divided into the following heads—I. The provisions relating to hackney carriages; II. To stage coaches; III. To railways; and IV. To conveyances by water.

I. The provisions relating to hackney coaches are to be found in the 1 & 2 Will. IV. c. 22, (amended by 6 & 7 Vict. c. 86,) which repealed all previous acts on this subject, and provided new enactments.

According to these acts (*b*) a hackney carriage is determined to be every carriage (except a stage carriage) which

(*a*) 13 & 14 Car. 2, c. 2; 5 W. & Ann. c. 23, &c. &c.
M., c. 22; 6 & 7 Will. 3, c. 18; 9

(*b*) 6 & 7 Vict. c. 86, ss. 2, 3.

shall stand on hire or ply for a passenger for hire at any place within the limits of the city of London and the liberties thereof, and metropolitan police district.

These acts require in the first place that both the hackney carriages themselves, and their drivers, should be respectively *licensed*.

For by the first act no person may let to hire any hackney carriage (if used for the purpose of standing or plying within five miles from the General Post Office) without having a licence so to do from two of the Commissioners of Stamps (*c*)—in respect of which certain duties are payable—or without having such proper numbered plates as therein described, placed and fixed upon the carriage in manner therein directed (*d*).

And by the second of the acts above-mentioned no person shall act as driver of a hackney carriage, or as “waterman” (*e*) within the limits of the act, without a licence and a numbered metal ticket, to be granted by an officer appointed by one of her Majesty’s principal secretaries of state, called the “Registrar of Metropolitan Public Carriages” (*f*).

This licence (on which a certain stamp duty is imposed) can be granted only on a satisfactory certificate of good behaviour and fitness for the situation, and cannot be granted to any driver who is under sixteen years of age (*g*); and may be revoked or suspended by a justice of the peace on the conviction of the driver or waterman for any offence (*h*); and with respect to the numbered ticket it is provided, that the driver or waterman shall carry it, while

(*c*) 1 & 2 Will. 4, c. 22, s. 6; 6 & 7 Vict. c. 86, s. 3.

(*d*) 1 & 2 Will. 4, c. 22, s. 22.

(*e*) Defined to include every person supplying water to the drivers of hackney carriages at the standings or places where hackney carriages usually stand or ply for hire, and every person assisting the drivers at such

standing in managing or taking care of the horses or carriages, and every attendant upon any metropolitan stage carriage at places where such carriages usually stop or ply for passengers; 6 & 7 Vict. c. 86, s. 2.

(*f*) 6 & 7 Vict. c. 86, ss. 5, 8, 10.

(*g*) Ibid. ss. 8, 14.

(*h*) Ibid. s. 25.

engaged in his employment, conspicuously upon his breast, and permit it to be freely inspected, at the request of any person whatever (*i*).

Very minute and careful regulations are also provided by the legislature for the protection of the public against the incivility, extortion, or other misconduct of hackney coach drivers.

It would be improper in a work like the present to enumerate the whole of these; but among the principal provisions we may notice that penalties are imposed upon any driver who refuses to drive to any place to which he is ordered to go, within the distance of five miles from the Post Office (*k*), or refuses to wait as long and where he is ordered (*l*), or neglects to hold in his hand the check-string belonging to such carriage while he is driving the same (*m*), or omits to carry to the Stamp Office any property which may be inadvertently left behind in his carriage (*n*), or authorizes any other person than himself to drive, without the consent of the proprietor (*o*), or is guilty of wanton or furious driving, or by carelessness or wilful misbehaviour causes any hurt or damage to any person or property in any street or highway (*p*), or plies for hire elsewhere than at an appointed stand, or by loitering or wilful misbehaviour causes any obstruction, or improperly delays the carriage, or wilfully deceives any person as to its route or destination, or refuses to admit and carry at the lawful fare any passenger for whom there is room, and to whom there is no visible objection, or demands more than the legal fare, or, except in case of accident or unavoidable necessity, stops his carriage upon any place where foot passengers usually cross, or plies by blowing a horn or using a noisy instrument within the liberty of the metropolis (*q*). And heavy penalties are also imposed

(*i*) 6 & 7 Vict. c. 86, s. 17.

(*k*) 1 & 2 Will. 4, c. 22, s. 34.

(*l*) Ibid. s. 47.

(*m*) Ibid. s. 48.

(*n*) Sect. 49.

(*o*) 6 & 7 Vict. c. 86, s. 27.

(*p*) Ibid. s. 28.

(*q*) Ibid. s. 33.

on every person, whether driver or waterman, who during his employment shall be drunk or make use of any abusive or insulting language, or be guilty of any insulting gesture or misbehaviour (*r*).

On the other hand any one refusing to pay his legal fare, or who injures the carriage, must make such satisfaction to the driver as a justice of the peace shall direct, or be committed to prison (*s*). And if the driver be ordered to wait at any place he may require a reasonable deposit (*t*).

It is also to be noticed that when any complaint is made before any justice of the peace against the *driver*, the *proprietor* may (if the justice shall think fit) be summoned to produce the driver, and that on the failure of the proprietor to do so, the justice may proceed to determine the case in the absence of the driver, and order the penalty to be paid by the proprietor (*u*).

II. The provisions relative to stage coaches will be found embodied in 2 & 3 Will. IV. c. 120, amended by 3 & 4 Will. IV. c. 48; 2 & 3 Vict. c. 66; and 5 & 6 Vict. c. 79.

By the first of these acts a "stage carriage" is determined to be every carriage (whatever be its form or construction) which is drawn by animal power, and used for the purpose of conveying passengers for hire to and from any place in Great Britain, and travelling at the rate of three miles or more in the hour, and for which separate fares shall be charged to separate passengers (*x*).

No carriage is to be kept for this purpose unless the person who keeps it has a licence so to do from two or more of the Commissioners of Stamps, which must be yearly renewed, and in respect of which certain duties are made payable (*y*); nor unless there be fixed on such carriage, in manner as by the several acts provided, such

(*r*) Ibid. s. 28.

(*s*) 1 & 2 Will. 4, c. 22, s. 41.

(*t*) Ibid. s. 47.

(*u*) 6 & 7 Vict. c. 86, s. 35.

(*x*) 2 & 3 Will. 4, c. 120, s. 5.

(*y*) Sect. 6.

numbered plates and particulars as are thereby directed to be fixed and painted on the carriage; and such painted particulars are to specify the christian and surname of the proprietor, or one of the proprietors, the extreme places to which the licence extends, and the greatest number of inside and outside passengers which the carriage may lawfully convey (*z*).

The drivers and conductors of these carriages however (with the exception of that description of them called “Metropolitan Stage Carriages”) are not obliged to be licensed, nor to carry on their person any distinctive badge—but numerous penalties are imposed for offences or neglects which would seem to militate against the safety or convenience of the public. Among these may be mentioned—driving a stage coach without or with a defective licence, or without having such plates and painted particulars as above referred to (*a*)—carrying too many passengers or too much luggage (*b*); and in short any intoxication, negligence, furious driving, or other misconduct, in the driver or conductor, which shall endanger the safety of any passenger or other person, or the property of any person, including the proprietor of the coach (*c*).

Besides all which, by 2 & 3 Will. IV. c. 120, it is provided, that if it shall happen that the driver, conductor, or guard of any stage carriage, shall have committed any offence against that act, but is not known, or, being known, cannot be found, the proprietor shall be liable to the same penalty as if he had been driver when the offence was committed, unless he can prove by any other evidence besides his own testimony, and to the satisfaction of the justice of the peace before whom the complaint was heard,

(*z*) 2 & 3 Will. 4, c. 120, s. 36;
5 & 6 Vict. c. 79, ss. 11, 13, 14. As
to *mail* coaches and how far they are
excepted, see 2 & 3 Will. 4, c. 120,
s. 46; 5 & 6 Vict. c. 79, s. 12.

(*a*) 2 & 3 Will. 4, c. 120, ss. 30—
36; 5 & 6 Vict. c. 79, s. 14.

(*b*) 3 & 4 Will. 4, c. 48, ss. 2, 3,
4; 5 & 6 Vict. c. 79, s. 15.

(*c*) 2 & 3 Will. 4, c. 120, s. 48.
As to the right of action of passengers
for negligence, &c. of the driver, vide
post, p. 471.

that the offence was committed without his privity or knowledge, and that he has derived no benefit therefrom, and that he has used his endeavours to find out such driver, conductor, or guard, and given all reasonable information in answer to inquiries respecting him.

Stage carriages, it is to be observed, are expressly exempted (*d*) from the provisions with respect to hackney coaches before discussed; but the branch of them already referred to under the name of “metropolitan stage carriages” is comprised (in common with hackney coaches) under the provisions of the before mentioned statute of 6 & 7 Vict. c. 86.

By this act, a “metropolitan stage carriage” is determined to be any stage carriage except such as shall on every journey go to or come from some town or place beyond the limits of the city of London and the liberties thereof, and metropolitan police district (*e*); and it is provided that the proprietor of every metropolitan stage carriage shall keep distinctly painted, both on the outside and inside, in such manner as shall from time to time be directed by the registrar, the words *metropolitan stage carriage*, or such other words as the registrar shall direct, together with the number of the stamp office plate relating to it; and shall also on the inside keep distinctly painted in a conspicuous manner a table of fares (*f*). In addition to which we shall only remark, that the provisions made by this act with respect to the drivers of hackney coaches, comprise also in general the drivers and conductors (*g*) of metropolitan stage carriages, who are required to have the same description of licences and numbered tickets, and are subject to the same penalties for the same species of misbehaviour as the drivers of hackney coaches (*h*).

(*d*) 2 & 3 Will. 4, c. 120, s. 31.

(*e*) 6 & 7 Vict. c. 86, s. 2.

(*f*) Ibid. s. 3.

(*g*) The word *conductor* includes every director or other person except

the driver who attends on the passengers. 6 & 7 Vict. c. 86, s. 2.

(*h*) Ibid. s. 33. See also as to duties, 5 & 6 Vict. c. 79.

III. Railways.

Besides the several acts from time to time passed which authorize the construction of particular railways, there exist acts of general regulation.

By 3 & 4 Vict. c. 97, the preamble of which recites that "it is expedient for the safety of the public to provide for the due supervision of railways," and by 5 & 6 Vict. c. 55 (*i*), it is enacted, that it shall be penal to open any railway, or portion of railway, for the public conveyance of passengers, until a month's notice in writing shall have been given by the company to whom it may belong to the Board of Trade, of their intention of opening the same, and ten days' notice of the time when the railway would be open for inspection (*h*).

It is also enacted that the Board of Trade may order every railway to make returns of the aggregate traffic in passengers, cattle, and goods; of the occurrence of any serious accident, and a table of all tolls and rates from time to time levied (*l*); and may also appoint proper persons as inspectors of railways (*m*).

Every railway company is also required (whether so called upon or not) to report to the Board of Trade every accident attended with serious personal injury within forty-eight hours of its occurrence (*n*), and to lay before the Board of Trade for its approbation certified copies of the bye laws and regulations by which the railway is governed (*o*), which bye laws may be disallowed by the board at its pleasure; and the board is moreover empowered to direct the attorney-general to proceed against any railway company for their non-compliance with the provisions either of particular acts or the acts of general regulation, or their commission of any act unauthorized by law (*p*).

(*i*) Sect. 2.

(*k*) 5 & 6 Vict. c. 55, ss. 4, 5.

(*l*) 3 & 4 Vict. c. 97, s. 3; 5 & 6 Vict. c. 55, s. 8.

(*m*) 3 & 4 Vict. c. 97, s. 5; 7 &

8 Vict. c. 85, s. 15.

(*n*) 5 & 6 Vict. c. 55, s. 7.

(*o*) 3 & 4 Vict. c. 97, ss. 7, 8.

(*p*) 7 & 8 Vict. c. 85, ss. 16—18.

Provision is also made for the summary apprehension and punishment of any engine-driver or other servant of the company guilty of any misconduct, and for the punishment of ill-disposed persons who shall obstruct any engine or carriage, or endanger the safety of the passengers (*q*).

Railway companies are obliged to maintain and repair good and sufficient fences along their lines (*r*); to transport, at a settled rate, military and police forces (*s*), and mails (*t*); to permit and facilitate the introduction of electrical telegraphs upon their lines (*u*); to keep a strict account of money received for the conveyance of passengers, or from other sources upon their respective lines; to deliver the same to the commissioners of the stamps and taxes; and to pay a monthly duty thereupon (*v*).

By the latest act of general regulation on this subject, 7 & 8 Vict. c. 85, it is provided, that if twenty-one years after the establishment of any passenger railway by act of that or any future session, the average profit for the three last years upon the paid up capital stock shall be found to have amounted to £10 per cent., her Majesty's government shall be at liberty (an act of parliament being first obtained for that purpose) to revise and reduce the fares, upon condition of giving the company a guarantee to make good their profits to the amount of £10 per cent. during the existence of such reduced scale; or may, by the like sanction, (whether the average profits have been of that amount or not,) purchase the railway on behalf of her Majesty, at a rate to be fixed, in case of disagreement, by arbitration. The same act also directs the appointment on all passenger railways, established in that or any succeeding session, of cheap trains for the benefit of third-class passengers, with such accommodation as shall

(*q*) Sect. 15; 5 & 6 Vict. c. 55,
s. 17.

(*r*) Ibid. s. 10.

(*s*) Sect. 20; 7 & 8 Vict. c. 85,
s. 12.

(*t*) 1 & 2 Vict. c. 98; 7 & 8 Vict.
c. 85, s. 11.

(*u*) 7 & 8 Vict. c. 85, ss. 14, 15.

(*v*) 5 & 6 Vict. c. 79, s. 4.

be approved by the Board of Trade—and prohibits all railway companies whatever from raising loans for the future on negotiable securities, except as authorized by parliamentary enactment.

IV. Conveyances by water.

Of these the most antient kind that have been subject to regulation by law, are boats and barges on the river Thames.

By 2 & 3 P. & M. c. 16, the watermen and bargemen of the Thames were formed into a company, and many regulations were framed for their well ordering, for the safety and convenience of their boats, and for the assessment and moderation of their fares.

By 10 Geo. II. c. 31, and some intermediate statutes, these regulations were modified or extended (*w*), but by 7 & 8 Geo. IV. c. lxxv. they were all repealed and new provisions enacted.

By this act the “watermen, wherry-men, and lightermen of the Thames” were consolidated into one body corporate, in the freemen and apprentices whereof is vested, subject to certain exceptions, the exclusive right of navigating that river for hire (*x*).

The affairs of this company are governed by a court, consisting of twenty-six members (*y*), whose bye laws are subject to alteration and amendment by the court of mayor and aldermen of the city of London, and are to be ultimately approved by the courts at Westminster, or a judge thereof (*z*); among whose duties are comprised the appointing of plying places, and inspectors of plying places (*a*), the admission of freemen and the binding of apprentices (*b*), the granting licences to freemen

(*w*) 1 Jac. 1, c. 16; 11 & 12 Will. 3, c. 21; 4 Anne, c. 13; and see Jacob's Law Dict. in tit. *Watermen*.

(*x*) 7 & 8 Geo. 4, c. lxxv. ss. 4, 37.

(*y*) 7 & 8 Geo. 4, c. lxxv. s. 7.

(*z*) Sects. 57, 58.

(*a*) Sect. 25.

(*b*) Sect. 26.

to use boats for hire (*c*), and the registration of such boats (*d*).

The fares to be taken by the boatmen are to be fixed (subject to the approval of the privy council) by the court of mayor and aldermen (*e*); and lists thereof are to be publicly advertised, and fixed up at certain plying places (*f*).

The act also contains various provisions by which boatmen are subject to penalties for misbehaviour, particularly for demanding more than their legal fare, refusing to take a passenger, or to do what such passenger directs, preventing any person from reading the name or number of their boats, or making use of scurrilous or abusive language (*g*).

Similar remedies are also provided in favour of the boatmen, against persons who refuse to pay their fares, or do damage to the boats.

This act, it is to be observed, contains clauses reserving the rights of the Trinity House, particularly as to licensing mariners; and such mariners are to be subject, not to the bye-laws of the court of mayor and alderman, but to those of the corporation of the Trinity House. The fares, however, which shall be fixed by the former authority, shall be equally binding on the mariners of the Trinity House, as on the freemen of the Company of Watermen (*h*).

Another class of legislative provisions that require to be noticed under the head of conveyances by water are those which relate to the carriage of passengers in merchant vessels.

The statutes on this subject are two: first, the 4 Geo. IV. c. 88, by which provision is made as to vessels carrying passengers between Great Britain and Ireland; and, secondly, the 5 & 6 Vict. c. 107, called "The Passengers' Act" (*i*), which contains regulations as to passengers from

(*c*) Sect. 38.

(*d*) Sect. 41.

(*e*) Sect. 61.

(*f*) Sect. 64.

(*g*) Sects. 67, 69, 74, 78.

(*h*) Sects. 71, 73.

(*i*) Sect. 53.

any place in the United Kingdom to any place out of Europe, and not being within the Mediterranean Sea.

By 4 Geo. IV. c. 88, it is provided that no master of any vessel employed in the conveyance of passengers between Great Britain and Ireland, under two hundred tons, may take more than twenty passengers, unless a licence for the conveyance of passengers shall have been previously granted to him, or his owner, by the collector or chief officer of the customs at the port from whence such vessel shall sail; which licence must be annually renewed, and can be obtained only on certificate that such vessel is seaworthy, and properly found in every respect (*j*). And the number of passengers which may be lawfully conveyed in a ship so licensed, is to be in such proportion to the tonnage as in the said act is particularly specified.

The same statute also provides, with respect to trading or coasting vessels not wholly employed in the conveyance of passengers, and not licensed, which shall sail between Great Britain and Ireland, that no greater number of passengers than ten shall be taken if the burthen of the vessel be not above one hundred tons, nor more than twenty if it do not exceed two hundred (*k*).

By 5 & 6 Vict. c. 107, which repeals all previous statutes on the subject, the number of passengers (that is, exclusive of cabin passengers, whom it does not purport to include (*l*)), to be conveyed by any vessel from the United Kingdom, Guernsey, Jersey, Alderney, Sark, or Man, to any port out of Europe, and not within the Mediterranean Sea, is fixed in a certain proportion to her registered burthen, and also to the number of superficial feet appropriated to the use of each passenger (*m*). Vessels proceeding on such voyages must also be constructed in their lower decks, have such height between decks, such

(*j*) 4 Geo. 4, c. 88, s. 1.

(*k*) Sect. 4.

(*l*) 5 & 6 Vict. c. 107, s. 51.

(*m*) Sect. 2.

sleeping berths, such supplies of provisions and water, and such boats, as in the act are particularly specified (*n*).

Before proceeding on the voyage, if doubts shall arise as to the sea-worthiness of the ship, and such doubts are not removed to the satisfaction of the collector or comptroller of the customs at the port where she may be lying; or in case there shall be a government emigration agent at such port, then to the satisfaction of such emigration agent; it shall be lawful for either of the said officers (as the case may be) to cause the ship to be surveyed by two competent persons; and if she shall be reported not seaworthy, she cannot be cleared out, unless the falsity of such report be proved to the satisfaction of the commissioner of the customs, or the colonial land and emigration commissioner, as the case may be (*o*).

It is, moreover, incumbent upon the master of every ship carrying passengers on every such voyage, to sign and deliver (before he clears out his ship) to the collector or clearing officer a list of all his passengers, in the form of the schedule to the act annexed, and to deposit such list, countersigned by the clearing officer, with the collector of customs or consul at the final port of discharge (*p*).

In some cases a medical practitioner, duly authorized by law, is to form part of the ship's complement (*q*); and in all cases there shall be on board proper ship medicines, with directions for their use, with a medical certificate that they are adequate to the probable exigencies of the voyage. A prohibition is also contained against the sale of spirits to any passenger during the voyage, and a heavy penalty imposed in case of its violation (*r*).

Various other regulations are made for the protection of passengers, particularly that they shall not be landed at any place without their own consent, other than the place

(*n*) Sects. 3, 4, 5, 6, 13.

(*q*) Sect. 15.

(*o*) Sect. 12.

(*r*) Sect. 16.

(*p*) Sect. 17.

at which they may have contracted to be landed; and that after their arrival at such place, they shall be entitled to remain on board, and to be maintained, for forty-eight hours (*s*).

Some peculiar provisions are also made with respect to voyages to North America; and as to passengers to those parts it is enacted, that it shall be penal for any person, except the owner or master of the ship in which the passengers are taken, to act as a broker or passage dealer, unless he have a licence so to do from the justices of the peace, in petty or quarter sessions, for the district where he resides; which licence can only be obtained after notice given to the colonial land and emigration commissioners (*t*).

This act, however, has no application to ships carrying passengers not exceeding thirty in number, nor to any ship of war or vessel in the service of the Admiralty, or ship of war or transport belonging to the East India Company (*u*); but, subject to these exceptions, its provisions extend not only to British but to foreign vessels (*x*), and extend in part also not only to voyages from the mother country, but from the British West Indies, Malta and the Mauritius, and from all other colonies (including the East India possessions), where the local government shall think fit to adopt the act (*y*), to any other place whatsoever.

(*s*) Sects. 24, 25.

(*x*) Sect. 50.

(*t*) Sect. 20.

(*y*) Sect. 37, &c.

(*u*) Sect. 36.

CHAPTER X.

OF THE LAWS RELATING TO THE PRESS.

THE law of property in books and other publications has been already discussed under the head of copyright, in that part of the present work in which the right of property fell under consideration. Our attention will now be directed to the law which relates to the *means* of publication—in other words, to the press.

This mighty engine for good or evil is one that in its nature requires to be kept under some restraint, while it is perhaps even yet more essential that the restraint should not be carried so far as to preclude a reasonable liberty of discussion. In this country no censorship is exercised over the press; yet its excesses are held in check by restrictive provisions, the general object of which is to ascertain in every instance the persons by whom publications are printed, so as to make them amenable, whenever the case so requires, to the civil remedy of injured parties, or to the correction of criminal justice.

The nature of these provisions will appear on an examination,—first, of those statutes which bear upon printing in general,—secondly, of those which relate to particular species of publication.

I. As to printing in general.

The regulations which concern this subject are to be found in the statute 39 Geo. III. c. 79, amended by 51 Geo. III. c. 65, and by 2 & 3 Vict. c. 12 (*a*). The neces-

(*a*) See also the acts 39 & 40 Geo. 3, c. 95, and 41 Geo. 3, c. 80, to indemnify persons who had printed papers by order of public authorities, without complying with the regulations of 39 Geo. 3, c. 79.

sity for them was originally suggested (as the act first mentioned sets forth) by the multitude of writings of an irreligious, treasonable and seditious nature, which had latterly been published by certain societies;—their substance is as follows.—

Every person, who possesses any printing press or types for printing, must, by the 39 Geo. III. c. 79, deliver notice thereof (attested by one witness) to the clerk of the peace of the county or other division where the same is intended to be used, according to the form in the schedule to the act annexed; and that officer is required to file such notice, and transmit an attested copy thereof to one of the principal secretaries of state, and must also give to the possessor of the printing press a certificate in such form as the act specifies (*b*), expressing that such notice has been delivered. A similar notice is to be delivered to the clerk of the peace by any person who intends to carry on the business of a letter-founder or printing-press maker; and a similar certificate must be obtained (*c*). And every person who shall keep or use any printing-press or types, or make or sell any type for printing or printing-press, without having given such notice and obtained such certificate, shall forfeit 20*l*. But an exception is made in favour of the royal printers, and of the public presses of the Universities of Cambridge and Oxford.

It is also provided by the same act, under the like penalty, that every person, who shall sell types for printing or printing-presses, shall keep a fair account, in writing, of all persons to whom they shall be sold, and produce such account to any justice of the peace who shall require the same (*d*); and that every person who shall print any paper for hire or reward shall carefully preserve one copy of it at least, and shall write on the same in fair and legible characters the name and place of abode of the person or persons by whom he shall have been employed to print the same, and produce the copy to any justice of the

(*b*) Sect. 23.(*c*) Sect. 25.(*d*) Sect. 26.

peace who within six calendar months shall demand a sight thereof (*e*).

And it is farther enacted, that if any justice of the peace shall, from information upon oath, have reason to suspect that any printing-press or types for printing are used or kept for use, without notice given and certificate obtained as required by the act, or in any place not included in the notice and certificate, he may by warrant under his hand and seal direct any peace officer in the day time to enter such place, and seize and carry away every printing-press found therein, together with the types and other articles thereto belonging, as well as all printed papers (*f*).

It is moreover provided by the last of the statutes above enumerated (repealing a clause to the same general effect contained in the 39 Geo. III. c. 79), that every person who shall print any paper or book whatsoever which shall be meant to be published or dispersed, and who shall not print upon the front of every such paper (if the same be printed upon one side only), or upon the first or last leaf of every paper or book which shall consist of more than one leaf, in legible characters, his name and usual place of abode or business (*g*),—and every person who shall publish or disperse, or assist in publishing or dispersing, any paper or book printed with such unlawful omission,—shall for every copy so printed forfeit a sum not exceeding 5*l*. But no action or proceeding in any court or before any justice of the peace shall be commenced, except in the name of the Attorney-General or Solicitor-General. And it is farther enacted, that in the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words, “Printed at the University Press, Oxford,” or “the Pitt Press, Cambridge,” as the case may be.

There is also a clause to the effect that this and the preceding statutes shall be construed as one act of parlia-

(*e*) Sect. 29.

(*f*) Sect. 33.

(*g*) *Bensley v. Bignold*, 5 B. & A.

335; *Marchant v. Evans*, 2 Moore, 14.

ment; from which, and from certain enactments contained in these statutes, it follows that the provision with respect to the printer's name and place of abode extends not to any papers printed by the authority and for the use of either House of Parliament (*g*), or public board or office (*h*), or to the impression of any engraving, or the printing by letter-press, of the name, or the name and address, or business or profession of any person, and the articles in which he deals, or any papers for the sale of estates or goods by auction or otherwise, or to any bank note or security for payment of money, bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock, or securities, or dividend warrant thereon, receipt for money or goods, or proceedings in any court of law or equity; notwithstanding the whole or any part of the said securities, instruments and matters aforesaid shall be printed (*i*).

II. As to particular species of publications.

And herein—1. As to *Newspapers*.—Shortly before the introduction of the regulations relative to printed books and papers in general, provisions of the same tendency had been devised by the legislature in reference to that highly influential class of publications just mentioned. But the act at that time passed (*h*) has been since repealed; and the provisions now in force for the control of newspapers are contained in 60 Geo. III. & 1 Geo. IV. c. 9; 11 Geo. IV. & 1 Will. IV. c. 73, and 6 & 7 Will. IV. c. 76.

By the first of these acts it is among other things provided, that no person, under a penalty of 20*l.*, shall print or publish for sale any newspaper (*l*), or any pamphlet or other paper containing any public news, intelligence or

(*g*) 39 Geo. 3, c. 79, s. 28.

(*h*) 51 Geo. 3, c. 65, s. 3.

(*i*) *Ibid.*

(*k*) 38 Geo. 3, c. 78. This and the subsequent act 5 Will. 4, c. 2, are repealed by 6 & 7 Will. 4, c. 76, s. 32.

(*l*) As to the definition of a newspaper within the meaning of these acts, see 60 Geo. 3 & 1 Geo. 4, c. 9, ss. 1, 2, 3, and 6 & 7 Will. 4, c. 76; s. 4.

occurrence, or any remarks or observations thereon, or upon any matter in church or state, which shall not exceed two sheets, or which shall be published for sale at a less price than 6*d.*, until he shall have entered into a recognizance, if the printing be in London or Westminster, or into a bond, if in the country, together with two or three sufficient sureties, conditioned that the printer or publisher shall pay every such fine or penalty as may be at any time adjudged against him for printing or publishing any blasphemous or seditious libel (*m*).

By the second of these acts the amount of such recognizances and bonds is fixed at 400*l.* or 300*l.* (as the case may be), and it is provided that they shall be made with such conditions as to secure the payment of any damages or costs to be recovered in actions for libels, as well as to secure the payment of fines or penalties upon convictions.

By the last of these acts (which relates in part to the stamp duties on newspapers, a subject not now under consideration) it is enacted among other things, that no person shall, under a penalty of 50*l. per diem*, print or publish, or cause to be printed or published, any newspaper (*n*), (the London Gazette only excepted,) before there shall be delivered to the commissioners of stamps and taxes, or at the head office for stamps, or the proper officer appointed by the commissioners for the district, a declaration in writing, containing the correct title of the newspaper,—the true description of the house in which it is to be printed, and of that in which it is to be published,—the true name, addition, and place of abode of every intended printer and publisher thereof, and (with certain qualifications) those of the proprietors; and that every such declaration shall be signed by the printers and publishers therein specified, and by such of the proprietors therein specified as shall be resident within the united kingdom, and shall be renewed as often as changes in the concern shall occur; and that any false statement in such decla-

(*m*) Sect. 8.

(*n*) See *Ex parte Higginbotham*, 9 Dowl. P. C. 200.

ration, as to the printers, publishers, or proprietors, shall be deemed a misdemeanor(*p*).

It is also enacted, that copies of such declarations, certified as true copies, shall be admitted in all proceedings, civil or criminal; and, on all occasions touching such newspapers, as conclusive evidence, against the persons signing the same, of the truth of all matters therein set forth(*q*); and that the commissioners of stamps and taxes shall cause to be entered, in a book to be kept at the head office for stamps in Westminster, the title of every newspaper registered at the office, and also the names of the printers and publishers, as the same appear in the declarations; and all persons shall have free liberty to inspect such book without fee or reward(*r*).

The printer or publisher of every newspaper shall, moreover, under a penalty of 20*l.*, deliver at the ordinary price, at the head office for stamps, one copy of such newspaper as often as published, with the name and place of abode of the printer or publisher written thereon in his proper hand, or by some person duly appointed to sign for him; and in case any person shall make application within two years afterwards for the newspaper so signed, in order that it may be produced in evidence in any proceeding, civil or criminal, the commissioners shall either deliver it to him, or cause it to be produced in Court for that purpose(*s*).

There is an additional regulation, that at the end of every newspaper, and of every supplement sheet to the same, shall be printed the Christian name and surname, addition and place of abode of the printer and publisher, and a true description of the house or building wherein the same is printed and published respectively, and the day of the week, month and year on which the same is published; and any person knowingly printing or publishing without these particulars, or with a false statement

(*p*) Sect. 6. Vide *Stephens v. Robinson*, 2 Tyr. 280; *Houstoun v. Mills*, 1 M. & Rob. 325.

(*q*) Sect. 8.
(*r*) Sect. 10.
(*s*) Sect. 13.

as to name, addition, place or day, or a description of place different from that in the declaration before mentioned, shall forfeit 20*l.* (*t*).

And it is farther provided, that all penalties under this act, and that of 60 Geo. III. & 1 Geo. IV. above-mentioned, may be sued for in the name of the attorney-general or solicitor-general, or the solicitor of stamps and taxes, or any officer of stamp duties, but by no other person whatever (*u*).

2. With respect to *Pamphlets*.

It is to be observed that all the above noticed provisions of 60 Geo. III. & 1 Geo. IV. c. 9, and of 11 Geo. IV. & 1 Will. IV. c. 73, apply not only to newspapers, but to any pamphlet or other paper containing any public news, intelligence or occurrence, or any remarks or observations thereon, or upon any matter in church or state, which shall not exceed two sheets, or which shall be published for sale at a less price than sixpence (*x*). And also, that the above-mentioned act of 6 & 7 Will. IV. c. 76, applies not only to papers containing public news, but to those containing any remarks or observations thereon, if printed in any part of the united kingdom for sale, and published periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two numbers, where any of the numbers shall not exceed two sheets of twenty-one inches in length, and seventeen inches in breadth each, (exclusive of any cover or blank leaf, or any other leaf upon which any advertisement or other notice shall be printed); or shall be published for sale for a less sum than sixpence, exclusive of the duty by that act imposed (*y*).

(*t*) Sect. 14.

(*u*) 60 Geo. 3 & 1 Geo. 4, c. 9;
6 & 7 Will. 4, c. 76, s. 27.

(*x*) See the sections of these acts

cited *suprà*. And see farther provisions as to pamphlets, 60 Geo. 3 & 1 Geo. 4, c. 9, s. 1—5.

(*y*) Sect. 4, Sched. (A).

CHAPTER XI.

OF THE LAWS RELATING TO HOUSES OF PUBLIC
RECEPTION AND ENTERTAINMENT.

UNDER this general head we shall comprise, I. The Laws relating to Public Houses. II. Those relating to Theatres. And as to the first of these, we may remark, that the statutes affecting public houses are of two kinds: the first having in view the subject of *revenue*, the other of *police*, that is, the proper regulation of these places of public reception, and the prevention of the abuses to which they are naturally liable.

The statutes first referred to are those relative to the Excise, (a tax the general nature of which has been sufficiently noticed in a former volume (*a*)); and by one of these (6 Geo. IV. c. 81) it is provided (*b*) that every person who shall sell beer, cider or perry by retail, to be drunk or consumed in his house or premises, and every retailer of spirits or of wine who shall carry on his business without taking out an *excise licence* (*c*), (upon which the act imposes a certain amount of duty,) shall for every such offence shall forfeit 50/.

The other description of acts are those which relate properly to the licensing of publicans, (a system established by a variety of statutes, commencing with the reign of Edw. VI. (*d*)); and of these the principal one now in force is 9 Geo. IV. c. 61 (*e*), by which, in addition to the excise licence (*f*), publicans are required to obtain

(*a*) Vol. ii. p. 581.

(*b*) Sect. 26.

(*c*) As to excise licences, see also the general acts, (7 & 8 Geo. 4, c. 53; 4 & 5 Will. 4, c. 51; 4 & 5 Vict. c. 20), for the collection of excise.

(*d*) See 5 & 6 Edw. 6, c. 25.

(*e*) See also 35 Geo. 3, c. 113.

R. v. Dr. Drake, 6 M. & S. 116;

R. v. Hanson, 4 B. & A. 519; 1 Wms. Burn, 49.

(*f*) R. v. Drake, ubi supra; R. v. Downes, 3 T. R. 560; 1 Wms. Burn, 29.

a licence from the justice of the peace of the county or place authorizing them to sell in their public houses exciseable liquors by retail.

By this last mentioned act a penalty is imposed upon any person selling any exciseable liquor by retail, to be drunk or consumed in his house or premises, without being duly licensed so to do (*g*); and it is farther provided, that no licence for the sale of exciseable liquors shall be granted to any person who has not previously obtained from the magistrates a licence under that act (*h*); from which provision, however, an exception is now introduced by a subsequent act in the case of beer, cider, and perry, as we shall have occasion presently to explain.

For the purpose of granting these licences (which are to be annually renewed (*i*)) to the keepers of inns, ale-houses and victualling-houses, the statute directs that there shall be holden a special session of the justices of the peace (to be called the General Annual Licensing Meeting) once in every year, in every division, county, riding, city, town or town corporate throughout England (*j*); and also, that from four to eight special sessions shall be held in each year for the purpose of transferring the licences (*k*) so granted to other parties proposing to succeed to the same public houses, (which last-mentioned jurisdiction may, by a subsequent act (*l*), be also exercised at any petty sessions of the justices); and it is farther provided, that no justice who shall be, or shall be in partnership with, a common brewer or maker of exciseable liquor, shall act or be present at any meeting for granting or transferring licences; and that no justice whatever shall act in the case of any house of which he is owner, or to the owner of which he is agent, father, son, brother or partner (*m*).

(*g*) Sect. 18.

(*h*) Sect. 17.

(*i*) Sect. 13.

(*j*) Sect. 1.

(*k*) *Bryant v. Beattie*, 4 Bing. N. C. 254.

(*l*) 5 & 6 Vict. c. 44.

(*m*) 9 Geo. 4, c. 61, s. 6. As to appeal under this statute, see *R. v. Middlesex (Justices)*, 3 B. & Adol. 938.

These licences (which cannot be granted to a sheriff's officer, or officer employed to execute judicial process) (*n*) are in a fixed form prescribed by the act, and purport to empower the grantee to sell by retail in a certain inn, ale-house, or victualling house, as therein more particularly described, all such exciseable liquors as he shall be licensed to sell under the authority of any excise licence, and to permit all such liquors to be drunk or consumed in such house, provided that he do not fraudulently dilute or adulterate the same, or sell the same, knowing them to have been fraudulently diluted or adulterated, and do not use in selling thereof, any weights or measures that are not of legal standard, and do not wilfully or knowingly permit drunkenness or other disorderly conduct in his house, and do not knowingly suffer any gaming whatsoever therein, and do not knowingly permit persons of notoriously bad character to assemble therein, and do not keep open his house, except for the reception of travellers, or permit any exciseable liquors to be conveyed from his premises, during the usual hours of morning or afternoon service, on Sundays, Christmas Day, or Good Friday, but do maintain good order and rule therein (*o*).

Certain penalties are provided by the act for offences against the tenor of these licences, and such penalties (which are generally recoverable before two justices) increase in magnitude on repetition of the offence; and should the defendant be guilty of a third offence, and be convicted thereof at the Quarter Sessions, he may, in addition to a pecuniary penalty, be adjudged to have forfeited his licence, and to be incapable of selling exciseable liquors for the space of three years (*p*).

The act, moreover, provides (*q*) that any two justices, acting for a county or place where any riot or tumult shall happen, or be expected, may direct all such persons as are licensed under this act to close their houses, and every

(*n*) Sect. 16.

(*p*) Sect. 21.

(*o*) See Sched. (C); and 2 & 3

(*q*) Sect. 20.

Vict. c. 47, ss. 42, 43, 44.

person who shall fail to comply with the order, shall be deemed not to have maintained good order and rule therein.

Such are the chief regulations in force, with respect to obtaining a licence for selling exciseable liquors at a house, kept as an inn, ale-house, or victualling house; but by an exception recently introduced into the system, this licence is not now required, if beer or cider (*r*) be the only liquors intended to be retailed; for by 11 Geo. IV. & 1 Will. IV. c. 64; 4 & 5 Will. IV. c. 85, and 3 & 4 Vict. c. 61, various provisions have been made for giving greater facilities for the sale of these liquors, than was afforded by the former statutes.

By these acts, every householder assessed to the poor rates, in any parish or place, (and not being a sheriff's officer, or officer employed to execute judicial process,) may, without any licence from the magistrates, apply for and obtain an excise licence, (on which a certain duty is payable, and which is duly registered and must be annually renewed,) to enable him to sell beer and cider (*s*), or (on payment of a lower duty) an excise licence to sell cider only by retail, at some house situate within such parish or place, and specified in such licence (*t*).

But in order to obtain such licence, the applicant must produce an overseer's certificate that he is the real resident, holder and occupier of such house, and rated to the poor rate in a certain amount (*u*), and enter into a bond with one sufficient surety in the penal sum of 20*l.*, or two sufficient sureties in the penal sum of 10*l.* each, for the payment of such penalties as he may incur under the acts (*x*): and if he is also desirous for permission that the liquor should be drunk *on the premises*, he must, moreover, annually

(*r*) Beer is defined by these acts to include *ale and porter*, and *cider* to include *perry*, 11 Geo. 4 & 1 Will. 4, c. 64, s. 32.

(*s*) 11 Geo. 4 & 1 Will. 4, c. 64, s. 30.

(*t*) Sects. 1, 7; Leicester (Mayor) v. Burgess, 5 B. & Ad. 246.

(*u*) 3 & 4 Vict. c. 61, s. 2. In extra-parochial places, where there is no poor rate, a certificate is to be produced, stating in lieu of his being rated, the true annual value of the house, to the belief of two inhabitant householders, sect. 4.

(*x*) Sect. 4.

deposit with the commissioners of excise, or other person authorized to grant the licence, a certificate "of good character," signed by six rated inhabitants of the parish, of whom none shall be maltsters, common brewers, or licensed publicans, or owners of licensed public houses (*y*).

No such certificate, however, is required, when the house to be licensed is situate in London or Westminster, or within the bills of mortality, or within any city or town corporate, or within one mile from the place used at the last election from any town to parliament, where the population of such city or town exceeds 5000; and no licence, on the other hand, may be granted, even upon certificate, to sell in any such city or town (whatever the population), unless the house to be licensed is of the value of 10*l.* per annum (*z*).

It is moreover required, that every person obtaining a licence shall paint conspicuously over the door of his premises, in such form and manner as the acts specify, his christian name and surname at full length, and the words "licensed to sell beer (or cider) by retail," with the addition of "to be drunk on the premises," or, "not to be drunk on the premises," as the case may happen to be (*a*).

The beer and cider licenses are (like those granted by the magistrates) in a fixed form, and purport to empower the applicant to sell the article by retail in the particular house described (and that either generally, or for consumption on the premises, as the case may be), provided and on condition that he do not sell any beer, ale or porter, made otherwise than from malt and hops, nor mix, or cause to be mixed, any drugs, or pernicious ingredients in any of the liquors, nor fraudulently dilute, deteriorate, or adulterate the same (*b*), nor sell the same knowing them to be fraudulently diluted, deteriorated, or adulterated, nor use in selling the same any measures which are not of the legal standard, nor wilfully or know-

(*y*) 4 & 5 Will. 4, c. 85, s. 2.

s. 6; 4 & 5 Will. 4, c. 84, s. 18.

(*z*) Ibid. s. 21.

(*b*) Attorney-General v. Lockwood,

(*a*) 11 Geo. 4 & 1 Will. 4, c. 64, 9 Mee. & W. 378.

ingly permit any drunkenness, or any violent, or quarrelsome, or other disorderly conduct in his or her house or premises, nor knowingly suffer any gaming therein, nor any persons of notoriously bad character to assemble therein.

These acts require that persons, licensed to retail beer or cider, shall make entry of the houses and rooms where the liquors are stored or retailed, pursuant to the laws of excise, and shall incur heavy penalties if they receive or have in their possession, in the places so entered, any wine, spirits, or sweets (*c*); and penalties are besides imposed on every person who shall retail beer or cider without a licence (*d*); or who, being licensed, shall have or keep his house open, or suffer beer or cider to be drunk in his house, except within certain hours, or at any time before one in the afternoon, or at any time during which the houses of licensed victuallers shall be closed, on Sunday, Good Friday, Christmas Day, or any day appointed for a public fast or thanksgiving (*e*).

Penalties are also imposed (as in the case of inns and alehouses) on every retailer of beer or cider, who shall transgress, or allow to be transgressed, any of the conditions in his licence, and the penalties (which are generally recoverable before two justices) increase in severity according to the frequency of the offence; and on conviction of a third offence at the quarter sessions, the justices may not only inflict a pecuniary fine, but adjudge the premises to be disqualified for the sale of liquors, and the licence to be forfeited. In addition to which, the offender becomes incapable of selling such liquor by retail in any house for the space of two years (*f*). It is besides enacted, that every person who shall be lawfully convicted of felony, or selling spirits without a licence, shall for ever

(*c*) 3 & 4 Vict. c. 61, ss. 9, 10, 11.

(*d*) 11 Geo. 4 & 1 Will. 4, c. 64,
s. 7; 3 & 4 Vict. c. 61, s. 13.

(*e*) 3 & 4 Vict. c. 61, s. 15.

(*f*) 11 Geo. 4 & 1 Will. 4, c. 64,

s. 13, &c.: 4 & 5 Will. 4, c. 85, s.
11; 3 & 4 Vict. c. 61, s. 17.

thereafter be disqualified for selling beer and cider by retail; and if he has obtained a licence, and after such conviction shall continue so to sell the same, he shall incur the same penalty as an unlicensed person (*g*).

It is moreover provided (as in the case of inns and ale-houses), that in case of apprehended riots, the publicans may be required by order of two justices (or, in case of actual riots, one justice only) to close their houses at such times as the justices shall direct, and on non-compliance with such order, shall be deemed “not to have maintained good order and rule therein (*h*).”

And power is besides given to all constables and officers of police, to enter into all houses licensed to sell beer or spirituous liquors to be consumed on the premises, when and so often as they shall think proper; and if the publican refuse to admit them, he is liable to a pecuniary penalty; and upon a second offence, to be disqualified from selling beer and cider for two years (*i*).

It only remains to be noticed, while we are upon the subject of licences to sell exciseable liquor, that by 9 Geo. IV. c. 47, provisions are made by which it is lawful for masters and commanders of packets and other vessels used for the conveyance of passengers from one part of the united kingdom to another, to retail to their passengers foreign wines, strong beer, cider, perry, spirituous liquors, and tobacco, by taking out a licence so to do from the commissioners of excise; for which licence a duty is payable, and which must be yearly renewed; but by the provisions of the act it is made transferable.

II. The laws relating to theatres and other places of public amusement.

First, As to *theatres*.

It appears by acts of parliament and other documents, that theatrical exhibitions were introduced at an early

(*g*) 3 & 4 Vict. c. 61, s. 7.

& E. 124; *Newman v. Bendyshe*, 2

(*h*) 11 Geo. 4 & 1 Will. 4, c. 64,

Per. & D. 340.

s. 11; *Newman v. Hardwicke*, 8 Ad.

(*i*) 4 & 5 Will. 4, c. 85, s. 7.

period of our history ; and took place in some instances under the protection of the king or the nobles, or of the superiors of religious houses, in others by the sanction of the municipal authorities. By a statute, however, of 39 Eliz. c. 4, players were declared to be “ rogues and vagabonds,” unless acting as “ players of enterludes” to some baron, or person of high degree ; by 3 Jac. I. c. 21, provision was made against the use of profane expressions in stage plays ; and by 12 Anne, st. 2, c. 23, all common players of interludes were again classed among rogues and vagabonds. Afterwards, to put this subject on a more precise footing, the act 10 Geo. II. c. 28, was passed (*k*), by which it was enacted, that no person shall, for hire or gain, act, or cause to be acted, any stage entertainment, except under the authority of letters-patent from the crown, or licence from the lord chamberlain of the household (*l*), nor without first sending a copy thereof to the lord chamberlain, in order to obtain his permission to act the same. And farther that no patent or licence should be granted for performance in any part of Great Britain, except the city of Westminster and the liberties thereof, or some place where the sovereign should for the time be resident (*m*).

In consequence of this latter restriction, various local acts of parliament were afterwards made, from time to time, to enable the crown to license theatrical performances, in such provincial towns as were desirous of possessing theatres of their own ; and at length was passed, for the general accommodation of such towns, the statute 28 Geo. III. c. 30, by which the justices at quarter sessions were permitted (*n*), at their discretion, to grant licences to act in any place, within their jurisdiction, such tragedies,

(*k*) See *R. v. Handy*, 6 T. R. 286 ;
R. v. Neville, 1 B. & Adol. 489.

(*l*) *Gallini v. Laborie*, 5 T. R. 242.

(*m*) Repealed in favour of the city
of Edinburgh, by 7 Geo. 3, c. 27, s. 19.

(*n*) But such place must not have
been within twenty miles of Westminster, or eight of any patent theatre, or ten of a royal residence.

comedies, interludes, operas, plays, or farces, as should have been represented at the patent or licensed theatres in Westminster, or should have been duly submitted to the inspection of the lord chamberlain as aforesaid (*o*).

The subject, however, has now been placed under new regulations by the 6 & 7 Vict. c. 68, intituled "An Act for regulating Theatres." This statute (after repealing the then existing enactments) inflicts penalties upon any person who shall have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays (*p*), without the authority of letters-patent from the crown, or licence from the lord chamberlain of the household, or licence from at least four justices assembled at a special sessions, to be holden in the division where the proposed theatre is to be situate (*q*).

The jurisdiction of the lord chamberlain in this matter is defined by the act as extending to all theatres, (not being patent theatres,) within the parliamentary boundaries of London and Westminster, and the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark, and also within those places where the sovereign shall occasionally reside (*r*). The jurisdiction of the justices extends generally to all places beyond these limits (*s*); but it is provided, that no licence shall be granted by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being, who is to give security for the due observance of such regulations as the authorities may impose; and also that no licence shall be in force at the universities, or within four-

(*o*) Sect. 1.

(*p*) This word includes any tragedy, comedy, farce, opera, burletta, interlude, melo-drama, pantomime, or other entertainment of the stage, or any part thereof; but not a theatrical representation in a booth or show duly allowed at a fair or feast, &c. Sect. 23.

(*q*) Sect. 2. By 2 & 3 Vict. c. 47.

s. 46, the commissioners of police may authorize any superintendent, with constables, to enter any place used within the metropolitan police district for dramatic entertainment, and which is not a licensed theatre, and take into custody all persons found therein.

(*r*) Sect. 3.

(*s*) Sect. 5.

teen miles thereof, without consent of the chancellor or vice-chancellor (*t*). Penalties are moreover imposed on any person who acts, or causes to be acted, any part of a stage play in any place not being a patent theatre or duly licensed (*u*).

The statute farther empowers the justices to make suitable rules for ensuring order and decency in the theatres to be licensed by them, and for regulating the times when they are to be open, which rules may be rescinded or altered by a secretary of state; and in case of any riot or breach of rule in such theatres, the justices may order the same to be closed.

The lord chamberlain may also, as to all theatres licensed by him, or patent theatres, order the same to be closed, in case of riot or any public occasion whatever; and it is provided, that one copy of every new stage play, and of every new act, scene or part, prologue or epilogue, or new addition to a prologue or epilogue, intended to be acted for hire at any theatre in Great Britain, shall be sent seven days previously to the lord chamberlain, for his allowance, without which it shall not be lawful to act the same. The lord chamberlain is moreover empowered to forbid the representation or performance of any stage play, or any part thereof, in any theatre whatever, in any case where such a course shall appear to him advisable, whether for the preservation of good manners or decorum, or with a view to preserve the public peace; and it is enacted, that every person who shall, for hire, act or present, or cause to be acted or presented, any new stage play, act, scene, part, prologue, or epilogue, or any part thereof, until allowed by the lord chamberlain, or contrary to his prohibition, shall incur certain heavy pecuniary penalties, and the theatre shall also forfeit its licence.

Secondly. As to other places of amusement.

It is provided by 25 Geo. II. c. 36, s. 2 (*x*), that every

(*t*) Sect. 10.

(*u*) Sect. 11.

(*x*) As to this act, see *Levy v. Yates*, 8 A. & E. 129.

house, room, garden, or other place kept for public dancing (*y*), music (*z*), or other public entertainment of the like kind, in London and Westminster, or within twenty miles thereof, without a licence from the quarter sessions, shall be deemed a disorderly house, and the keeper thereof shall forfeit the sum of 100*l.*, and be otherwise punishable as the law directs in the case of disorderly houses (*a*). And it is farther enacted, that over the door or entrance of all such licensed places there shall be affixed and kept up the words "Licensed pursuant to act of parliament of the twenty-fifth of King George the Second," and that no house of this description is to be opened for the purpose of amusement before five o'clock in the afternoon (*b*).

But this act has no application to the Theatres Royal in Drury Lane and Covent Garden, or the King's Theatre in the Haymarket; nor to theatres licensed by the crown, or the lord chamberlain of the household (*c*).

(*y*) *Clarke v. Searle*, 4 Esp. 25; *Marks v. Benjamin*, 5 Mee. & W. 565.
Archer v. Willingrice, *ibid.* 186.

(*z*) *Bellis v. Burghall*, 2 Esp. 722; (*a*) Sect. 2.
Gregory v. Tuffs, 6 Car. & P. 271; (*b*) Sect. 3.
Gregory v. Tavernor, 6 Car. & P. 281; (*c*) Sect. 4.

CHAPTER XII.

OF THE LAWS RELATING TO PROFESSIONS.

IN most employments the rewards resulting from success, and the discredit and failure consequent upon incompetency, form a natural and sufficient security to the public, that they will not be undertaken without the necessary qualifications; but there are professions productive of evils so serious or irremediable, when improperly exercised, and so liable at the same time to be exercised by unfit persons, as to make it reasonable to subject them to the restraints of legal regulation. Those which our law deems to be of that character (or those at least which have attracted the notice of our legislature as such), are the professions of physicians, surgeons, and apothecaries; attornies and solicitors (*a*).

I. As to physicians, surgeons, and apothecaries: and herein,

1. As to *physicians*. The necessity of placing under supervision the practitioners of physic and surgery, appears from our statute book to have been early acknowledged, for we find in the 3rd year of Hen. VIII. (*b*) a statute, intituled "An Act for the appointing of Physicians and Surgeons," in which, after reciting the inconveniences and "greivous hurt, damage, and destruction of many of the king's liege people," forasmuch as "common artificers, as smiths, weavers, and women, boldly take upon them great cures, in which they partly use sorcery and witchcraft," it is enacted, that no person within London, or seven miles

(*a*) As to barristers, vide sup. vol. i. pp. 19, 20.

(*b*) C. 11.

thereof, shall practise as a physician or surgeon without examination, and licence of the Bishop of London or of the Dean of Paul's (duly assisted by the faculty); or beyond these limits, without licence from the bishop of the diocese, or his vicar general, similarly assisted. There is a saving, however, of the privilege of the universities of Cambridge and Oxford.

Five years afterwards, during the reign of the same monarch, a royal charter, dated 23rd Sept. 10 Hen. VIII. was granted for erecting a corporation of physicians in London, by which the above-mentioned superintendence of the bishops, so far at least as related to that profession, would seem to have been taken away.

By the statute of 14 & 15 Hen. VIII. c. 5, this charter was confirmed, and in virtue of such act and charter a perpetual college of physicians was established, with a constitution of eight *elects*, to be renewed as need should require, of whom one was to be annually elected president; and it was ordained, that this college should choose four physicians yearly, to supervise all others within London and seven miles thereof, "as also their medicines and receipts," so that such as offended should be punished with fines, imprisonment, or other means; and that no person should be at liberty to practise within that circle, except by the licence of the college, under a penalty of 5*l.* per month. All persons were likewise forbidden to practise even beyond that circle, unless they should have been first examined and approved by the president and three elects, or should be graduates of Cambridge or Oxford.

Afterwards, by 32 Hen. VIII. c. 40, it was farther provided, that any of the said company or fellowship of physicians being admitted by the said president and fellowship, might, from time to time, as well within London as elsewhere, practise *surgery*, as part of the general science of physic, any law to the contrary notwithstanding.

The charter of the college was subsequently confirmed and enlarged by the act of 1 Mar. sess. 2, c. 9, and by certain other charters of later dates, viz. 8th Oct. 15 Jac. I.

and 26th March, 15 Car. II., by which many important privileges and immunities are farther secured to that body (c).

2. As to *surgeons*. It will be seen, that the first of the statutes we have cited, viz. 3 Hen. VIII. c. 11, expressly includes this class of practitioners within its provisions. In the same reign surgeons were again regulated by the statute 32 Hen. VIII. c. 42; which after reciting that in London there were then two distinct companies of surgeons, the one called the *barbers of London*, and the other the *surgeons of London*, the first incorporated by King Edward IV., the second not incorporated, united these companies together into one body corporate, called "The Masters or Governors of the Mystery and Commonalty of Barbers and Surgeons of London," and allowed them (among other privileges) to take yearly for the purposes of anatomy the bodies of four persons, out of those executed for felony.

Afterwards by the statute 34 & 35 Hen. VIII. c. 8, notice is again taken of the surgical profession, but of a kind by no means complimentary; for it is recited, that the surgeons admitted by virtue of the antecedent act of 3 Hen. VIII., though for the most part of small cunning, took great sums of money, and impaired their patients instead of doing them good; and it is consequently enacted, that it shall be lawful for all the king's subjects, having knowledge of the nature of herbs, roots, and waters, to minister to any outward disease, any thing in the act 3 Hen. VIII. to the contrary notwithstanding.

The company of barbers and surgeons, however, still continued to subsist; and afterwards by a charter in their favour, dated 15th August, 5 Chas. I., all persons (except such physicians as therein mentioned) were prohibited

(c) The following are some of the cases in which questions respecting the privileges of the college of physicians have arisen. *R. v. Askew*, 4 Burr. 2186; *Rose v. Physicians' Col-*

lege (in error), 5 Bro. P. C. 553; *R. v. Physicians' College*, 7 T. R. 282; *Moises v. Thornton*, 8 T. R. 303; *Collins v. Carnegie*, 1 Ad. & El. 695.

from exercising surgery within London and Westminster, or within seven miles from London, for profit, unless they should be first examined by the company's examiners, and be therein duly admitted by the company (*d*). But at length, by statute 18 Geo. II. c. 15, the body compounded of the two callings of barber and surgeon (so ill assorted according to our modern notions) was broken into two distinct corporations (*e*); those thereof who had been admitted to practise surgery, being now constituted a body corporate, by the name of "The Master, Governors, and Commonalty of the Art and Science of Surgeons of London;" and at the same time authorized to choose governors, examiners, and other officers; and it was enacted, that it should for ever enjoy all the same privileges and franchises as the members of the former company, being admitted surgeons, could have enjoyed under the original act of union and the several letters-patent. The letters-patent were again confirmed by charter, 22nd March, 40 Geo. III., reincorporating the company by the style of "The Royal College of Surgeons, in London," and again by charter, 14th Sept., 7 Vict., when it received the appellation of "The Royal College of Surgeons of England." The charter last mentioned recites, that the college then consisted of members constituted such, either by the charter of 40 Geo. III. or by letters testimonial under the common seal of the college, as to the qualification of such members to practise the art and science of surgery; and that the governing body of the college consisted of a council, some of whom were examiners for the college; and it proceeds to create a new class of members, called fellows, from whom and by whom the council are to be in future elected, and provides that all future examiners be elected by the council, and hold their office at pleasure of the council. The charter also contains a clause, that no bye-law or ordinance thereafter to be made by the council shall be of any force, until the

(*d*) Preamble, 18 Geo. 2, c. 15.(*e*) Sharpe *q. t. v. Law*, 4 Burr. 2133.

royal approbation thereof shall have been signified to the college, under the hand of a principal secretary of state, or shall have been otherwise approved in such manner as parliament shall direct.

As to physicians and surgeons it is farther to be observed that the former cannot maintain an action for their fees, their employment (like that of a barrister) being of a merely honorary description (*f*); but surgeons are entitled to recover at law a reasonable compensation for their services (*g*). We have also to notice in connexion with these professions, the late act, 2 & 3 Will. IV. c. 75, intituled "An Act for regulating Schools of Anatomy," by which it is provided, that the executor or other person having lawful possession of the body of a deceased person, and not being intrusted with it for interment only, may permit such body of such person to undergo anatomical examination, unless in his lifetime he shall have expressed, in such manner as in the act provided, a wish to the contrary; or unless the surviving husband or wife, or other known relation of such person, shall otherwise require. And farther, that the secretary of state for the home department may grant licences to practise anatomy to any members of the college of physicians or surgeons, or to any graduates or licentiates in medicine, or any professors or teachers of anatomy, medicine, or surgery, or any student attending any school of anatomy, on application by such parties for the purpose, countersigned by two justices of the peace in such manner as the act provides; and that it shall be lawful for persons so licensed to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted so to do by a person having lawful authority as aforesaid in that behalf. But no anatomical examination shall be

(*f*) Co. Litt. 265, n.; *Chorley v. Bolcot*, 4 T. R. 317; *Little v. Oldaker*, 1 Car. & M. 370; *Battersby v. Lawrence*, *ibid.* 277. *Secus*, where there is an actual contract, *Veitch v. Russell*,

3 A. & E. N. S. 928.

(*g*) *Lipscombe v. Holmes*, 2 Camp. 441; *Baxter v. Gray*, 4 Scott, N. R. 374; and see *Richmond v. Coles*, 1 Dowl. N. S. 560.

lawful, unless conducted at some place, of which such secretary of state shall have had a week's notice, as a place where it is intended to practise anatomy; and the secretary of state is to appoint inspectors for all such places, who are to make quarterly returns as to the subjects carried in for examination. By this act also, together with some preceding statutes relating to the criminal law, all former provisions of that law authorizing the dissection of offenders after execution, are repealed.

3. With respect to *apothecaries*—they are regulated by the act 55 Geo. III. c. 194, which, after reciting (and for the most part confirming) a charter of James I., by which the “Society of the Art and Mystery of Apothecaries of the City of London” was incorporated, proceeds to enact, that no person shall practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales, unless he shall have been examined by a court of examiners (to be chosen by the master and wardens of the said company, in such manner as the act directs), and have received therefrom a certificate of his being duly qualified to practise as such (*h*).

The certificate (for which a certain sum is to be paid, for the benefit of the company's funds) is not to be granted to any person below the age of twenty-one, or who has not served an apprenticeship of five years to an apothecary, and can produce testimonials of sufficient medical education and good moral conduct; and any person practising without such certificate, is disabled from recovering his charges (*i*), and is moreover liable to a penalty of 20*l.* for every such offence (*h*).

It is also provided that (inasmuch as it is the duty of every apothecary to prepare with exactness such medicines as may be directed for the sick by any physician lawfully

(*h*) Sect. 14. As to what constitutes practice as an apothecary, see *Apothecaries' Comp. v. Warburton*, 3 B. & Ald. 40; *Same v. Greenough*, 1 A. & E. N. S. 799.

(*i*) Sect. 21.

(*k*) *Brown v. Robinson*, 1 Car. & P. 264; *Apothecaries' Company v. Greenwood*, 2 B. & Adol. 709.

licensed) any apothecary refusing to compound or sell, or negligently compounding or selling, any medicines as directed by any prescription or order, signed by any physician lawfully licensed with his initials, shall incur such penalties and forfeitures as therein set forth (*l*). And, farther, that the master, wardens, and society of apothecaries for the time being, or any persons by them appointed, and being not fewer than two, and properly qualified, may at all reasonable times in the day time enter the shops of any apothecaries throughout England and Wales, and search and examine whether the medicines and drugs be wholesome, and meet for the health of the subjects of the realm; and destroy such as they find to be otherwise; and report to the master and wardens of the society the names of the offenders, who are made liable to a fine of 5*l.* for the first, 10*l.* for the second, and 20*l.* for the third offence (*m*).

The act contains, however, a proviso that nothing therein shall affect the business of a *chemist and druggist* (*n*), in the buying, preparing, compounding, dispensing (*o*), and vending drugs, medicines, and medicinale compounds wholesale and retail; nor interfere with the rights of the Universities of Cambridge or Oxford, the College of Physicians or of Surgeons, or the Society of Apothecaries respectively, except as altered by that act (*p*).

II. As to *attornies and solicitors*.

The statutes relating to this branch of the legal profession being very numerous and complicated, were amended and consolidated by 6 & 7 Vict. c. 73, by which the

(*l*) As to the *remedy* of the patient against the negligence of his medical attendant, vide post, p. 472.

(*m*) Sect. 3.

(*n*) Sect. 28. See, as to this exception, *The Apothecaries' Company v. Greenough*, ubi sup.

(*o*) As to the meaning of *dispensa-*

tion, in pharmacy, see the same case.

(*p*) By 6 Geo. 4, c. 133, s. 4, it is provided, that every person holding a warrant as surgeon or assistant-surgeon in the army or navy, may practise as an apothecary, without undergoing the examination, or receiving the certificate required by the 55 Geo. 3.

previous enactments as to the qualification, admission, and regulation of attornies and solicitors are repealed.

By this statute it is enacted, that no person shall act as an attorney or solicitor, or as such sue out any writ or process, or commence, carry on, solicit or defend, any action or other proceeding in the name of any other person or in his own name, in any court of civil or criminal jurisdiction, or in any court of law or equity in England or Wales, unless he shall have been admitted, enrolled, and be otherwise duly qualified, to act as attorney or solicitor, either previously to, or else in pursuance of, the present statute (*q*).

To entitle a person for the future, to this admission and enrolment, it is required, 1st, that he shall have served (having been duly bound by contract in writing so to do), with some practising attorney or solicitor in England or Wales, a clerkship of five years (*r*); or if he shall have taken a degree, under such circumstances as in the act mentioned, at Cambridge, Oxford, Dublin, Durham, or London, a clerkship of three years (*s*). And, 2ndly, that in addition and subsequently to such services he be examined by, or by direction of, one or more of the judges at Westminster, or (in the case of a solicitor) by the master of the rolls, touching his articles, service, fitness and capacity to act.

For this purpose the judges, or any eight of them, including the three chiefs, or (in the case of a solicitor) the master of the rolls, may from time to time appoint examiners, and make such rules as to the examination as they may think proper (*t*); and the judges, or any one of them, upon being satisfied by such examination, or by the certi-

(*q*) By 7 & 8 Vict. c. 101, s. 70, however, clerks and officers to boards of guardians, &c., under the Poor Laws, may commence or defend proceedings before magistrates in special or petty sessions, or out of sessions, without being so qualified.

(*r*) Sects. 2, 3. See 7 & 8 Vict. c. 86, repealing 34 Geo. 3, c. 14, as to the enrolment of the indentures of clerks to attornies.

(*s*) Sect. 7.

(*t*) Sects. 16, 17, 18.

ificates of such examiners, of the competency of any candidate for admission, shall administer to him such oath as specified in the act, viz. "that he will truly and honestly demean himself in practice," and also the oath of allegiance; and after such oaths shall cause him to be admitted as an attorney of the said courts of law at Westminster, or as solicitor of the High Court of Chancery, as the case may be, and his name to be inrolled as an attorney or solicitor of such courts; which admission shall be written on parchment, signed by such judge or judges, or master of the rolls, and impressed with the proper stamps(*u*).

It is moreover enacted, that there shall be a *registrar of attornies and solicitors*, whose duty it shall be to keep an alphabetical list or roll of all attornies and solicitors, and to issue certificates as to persons who have been duly admitted and enrolled; and the duties of this office are by the act committed to the "Incorporated Law Society," until some person shall be appointed in their room(*x*).

Such a certificate from the registrar of due admission and enrolment must be produced to the commissioners of stamps and taxes by any person desirous of practising as an attorney or solicitor, before he can obtain from them the stamped certificate required by the Stamp Act, 55 Geo. III. c. 184(*y*), authorizing him to practise for the ensuing year(*z*); and, in order to obtain such registrar's certificate, a declaration in writing, signed by the attorney desirous of practising, or by his partner, or, in some cases, by his London agent, containing his name and address, the courts of which he is an admitted attorney or solicitor, and the date of his admission, must be delivered to the registrar(*a*). And if any attorney or solicitor shall practise in any of the courts aforesaid, without having obtained a stamped certificate for the current year, he shall be incapable of maintaining any action or suit to recover his

(*u*) Sects. 15, 16.

7 Vict. c. 73.

(*x*) Sect. 21.

(*z*) Sect. 22.

(*y*) See Schedule 1, part ii. of 6 &

(*a*) Sect. 23.

fees or disbursements for business done under such circumstances (*b*).

The statute we are considering also contains the following regulations ;—among others of less general interest:—

That no attorney or solicitor shall have more than two clerks bound by contract in writing as aforesaid at one and the same time, nor any such clerk after he shall have left off business, nor while he himself acts as a clerk ; and that if he becomes bankrupt, or takes the benefit of the Insolvent Act, or be imprisoned for debt for twenty-one days, the court may order his clerk to be discharged or assigned over to some other person (*c*).

That a person so bound as aforesaid as clerk for five years, to an attorney or solicitor, may serve one of those years as pupil with a practising barrister, or certificated special pleader, or with the London agent of the attorney or solicitor to whom he is bound (*d*).

That clerks whose masters have died or left off business during the term, or whose articles have been cancelled or discharged, may enter into new articles with other masters, which shall be available for the residue of the term (*e*).

That all persons admitted as attornies of one of the superior courts of law at Westminster may, upon production of a certificate thereof, be admitted in any other court of law in England or Wales, upon signing the roll of the same ; and that persons admitted as solicitors in the High Court of Chancery may in like manner obtain their admission in all other courts of equity, and in the Court of Bankruptcy (*f*).

(*b*) Sect. 26.

(*c*) Sects. 4, 5.

(*d*) Sect. 7. If he is bound for three years, under the exception mentioned above, (p. 332), he may serve one year with the London agent of the attorney or solicitor to whom he is bound.

(*e*) Sect. 13.

(*f*) Sect. 27. An attorney has by the common law the privilege of not being liable to be sued (generally), except in the court or courts to which he belongs. See Gage's case, 11ob. 177 ; Gardner v. Jessop, 2 Wils. 42 ; Lewis v. Kerr, 2 Mec. & W. 226.

That no attorney or solicitor, who shall be a prisoner in any gaol or prison, may commence or defend any action, suit, or proceeding in law, equity, or bankruptcy, or maintain an action for fees for business done during such his confinement(*g*); and that no practising attorney or solicitor shall be a justice of the peace in England or Wales, except in counties or towns corporate having justices by charter or otherwise(*h*).

And that no attorney or solicitor shall commence an action or suit for his fees or charges in respect of any business whatever, until after the expiration of one calendar month after a bill of such costs and charges, signed by such attorney or solicitor, shall have been delivered to the party to be charged; and such party may, on a proper application, obtain an order for referring such bill to be taxed, and for staying all proceedings to recover the amount thereof in the meantime. An order may also be obtained directing an attorney or solicitor to deliver his bill, (when he has not done so,) and also an order for his delivering up all deeds, papers, and documents in his possession or power touching the business in such bill comprised(*i*).

It is provided, however, that the act shall not extend to the examination, admission, rights, or privileges of any person appointed to be solicitor to the treasury, customs, excise, post-office, stamp duties, or any other branch of the revenue, or the solicitor of the city of London, or the assistant of the council for the affairs of the admiralty or navy, or the solicitor to the board of ordnance(*k*).

(*g*) Sect. 31.

(*h*) Sects. 33, 39.

(*i*) Sect. 37.

(*k*) Sect. 47.

CHAPTER XIII.

OF THE LAWS RELATING TO BANKS.

THE invention of banking appears to be due to the Republic of Venice. So early as the year 1171, Jews were accustomed to keep benches in the market place of that state for the exchange of money and bills, and *banco* being the Italian for *bench*, banks may have taken their denomination from this circumstance.

In our own country the business of banking appears to have been originally carried on by the goldsmiths; and accordingly we find it recited in an act of the 22 & 23 Car. II., "that several persons, being goldsmiths and "others, by taking up or borrowing great sums of money, "and lending out the same for extraordinary hire and "profit, have gained and acquired to themselves the reputation and name of bankers" (a).

Afterwards, in the reign of William and Mary, the project was conceived (in imitation, as it would seem, of the banks of Amsterdam and Genoa, already founded) of establishing in England a national institution of the same description; and in 1694, parliament was accordingly prevailed upon, though with difficulty (owing to apprehensions then entertained of the policy of the measure), to pass an act sanctioning the creation of that great corporate body, which has since become so celebrated, under the denomination of "The Governor and Company of the Bank of England."

Our present laws relative to banking apply either to the Bank of England, or to certain establishments of a very recent origin, commonly denominated joint-stock banks or to private banks. In proceeding to give some account of the legal history of the first, we shall be led by necessary connexion to notice that of the two latter also.

(a) See Jacob's Dict. in tit. Bankers.

The act already referred to as the origin of the Bank of England, was the 5 W. & M. c. 20. It empowered their majesties to receive voluntary subscriptions from any persons, native or foreign, or any bodies corporate, to the amount of 1,200,000*l.*, to be paid into the Exchequer towards the prosecution of the war with France (*b*); and, by letters patent under the Great Seal (which were in fact afterwards granted under date 27th July, 1694), to incorporate all such subscribers into a company, to be called "The Governor and Company of the Bank of England;" and such subscribers were to be paid, out of the duties to be levied under that act, 100,000*l.* per annum (*c*). It was provided, however, that they should not borrow more than 1,200,000*l.*, so as to owe more than that sum at a time, unless upon such funds as should be agreed in parliament (*d*); and that their majesties' subjects might not be oppressed by the said corporation, by their monopolizing or "engrossing any sort of goods, wares, or merchandize," they were prohibited from buying and selling goods (*e*). But the act declared the Bank entitled, nevertheless, to deal in bills of exchange, or to buy and sell bullion, gold, or silver, or to sell any goods whatsoever, which should be left with it in pledge, and not redeemed at the time agreed upon, or within three months after, or to sell goods, the produce of lands which it should have purchased (*f*); and from the time of the passing of the act, or soon afterwards, we find that the Bank began the practice, which it has ever since maintained, of issuing its own notes (*g*).

By subsequent acts its capital was progressively enlarged, and an exclusive privilege or monopoly established in its favour (*h*); for by one of these, 8 & 9 Will. III. c. 20, (explained by 15 Geo. II. c. 13, s. 5,) it was enacted, that no other bank, or company in the nature of a bank,

(*b*) Sects. 19, 41.(*c*) Sects. 19, 20.(*d*) Sect. 26.(*e*) Sect. 27.(*f*) Sect. 28.(*g*) Vide Bank of England v. Anderson, 3 Bing. N. C. 653, 654.(*h*) As to the Bank's exclusive pri-

should be allowed to be established by act of parliament within this kingdom (*i*) ; and by another, 6 Ann. c. 22, that it should not be lawful for any other corporation, or for more than six persons united in partnership, in England, to borrow, owe, or take up any money on their bills or notes, payable on demand, or at less time than six months from the borrowing thereof (*k*). And though these exclusive privileges (popularly called the Bank Charter) have been since in part relinquished, they are also in part still extant, as we shall have occasion more particularly to explain in the course of the chapter.

Subject, however, to the Bank Charter, as from time to time modified, the trade of banking has, from its first introduction, been always free ; and other banks besides the Bank of England have consequently been long established among us, and that both in London and the country. But as between the country and the London banks, the following distinction has practically obtained, that the former have usually carried on business, like the Bank of England, as *banks of issue* (*l*), that is, have made payments by their own notes, while, on the other hand, the latter have been *banks of mere deposit*, that is, have made payments in cash and Bank of England notes only, and not in notes of their own.

The character of the Bank of England, and of its transactions, has always maintained, nevertheless, an importance far greater than that of any of these establishments ; for while it has carried on the business ordinarily incident to banking, such as receiving deposits of money, issuing its own paper, and discounting mercantile bills, it has been also employed as a great engine of state, by receiving and paying the interest due to the public cre-

vilege, vide *Bank of England v. Anderson*, ubi sup. ; *Booth v. Bank of England*, 6 Bing. N. C. 415.

(*i*) 8 & 9 Will. 3, c. 20, s. 28.

(*k*) 6 Ann. c. 22, s. 9.

(*l*) By 4 & 5 Vict. c. 50, and 7 &

8 Vict. c. 32, ss. 6, 18, the Bank of England and all other banks of issue are required to make periodical returns of the amount of their notes in circulation, which are to be published in the *Gazette*.

ditors (*m*), (for which it has received an allowance from the public (*n*),) by circulating exchequer bills, by accommodating the government with immediate advances, on the credit of distant funds, and assisting generally in all the great operations of finance. Its advances to the government, however, are subject to the restrictions imposed by 59 Geo. III. c. 76, which enacts, in conformity with an early regulation (*o*), that it shall not be lawful for the bank to advance or lend to the crown any money whatever, upon the credit of any exchequer bill or treasury bill, or other government security, or in any other manner whatever, without the express and distinct authority of parliament for that purpose first obtained; but without prejudice to its right of purchasing any exchequer bills or government securities, then by law permitted, or to its advancing at the receipt of the Exchequer any money whatever, not exceeding in the whole the sum necessary to make good any deficiency in the Consolidated Fund (*p*) at the close of any quarter, upon the credit of exchequer bills, issued under the authority of the act 57 Geo. III. c. 48, or the act 59 Geo. III. c. 19.

In the year 1797, owing to a temporary failure in public credit, and a consequent run upon the Bank, it was deemed necessary to restrain it for a limited period from making payments in cash; and an act of parliament, 37 Geo. III. c. 45, was passed in that year for the purpose, the provisions of which were continued, by subsequent acts (*q*), until the 1st of May, 1823, when the restriction ceased.

In the year 1826, the Bank consented to an arrangement (*r*), by which it was authorized (so far as its already existing powers might be deemed inadequate to the pur-

(*m*) As to the national debt, vide sup. vol. ii. p. 586.

(*n*) As to this allowance, see 48 Geo. 3, c. 4, s. 6; 7 & 8 Vict. c. 22.

(*o*) 5 W. & M. c. 20, s. 30.

(*p*) Vide sup. vol. ii. p. 590.

(*q*) 37 Geo. 3, c. 91; 38 Geo. 3,

c. 1; 42 Geo. 3, c. 40; 43 Geo. 3, c. 18; 44 Geo. 3, c. 1; 54 Geo. 3, c. 99; 55 Geo. 3, c. 28; 56 Geo. 3, c. 40; 58 Geo. 3, c. 37; 59 Geo. 3, c. 49.

(*r*) Vide 7 Geo. 4, c. 46, ss. 1, 15.

pose) to extend the circulation of its paper, by establishing in country districts banks of its own, managed by its agents on the spot, while on the other hand it relinquished in part its exclusive privileges, so as to admit (within certain limits, and subject to certain conditions) the introduction of other banking corporations and banking companies exceeding six in number, with power to issue bills or notes, though payable on demand, or at less time than six months from the borrowing; which companies have been since commonly denominated *joint stock banks* (s).

Both these objects were carried into effect by the 7 Geo. IV. c. 46. As to the first it is provided, that it shall be lawful for the said governor and company to authorize any committee or agents to carry on banking in their behalf, at any place in England, and to give them the necessary powers of management and superintendence, and to issue to such agents, or their officers or servants, cash, bills, notes, and other securities; subject however to a proviso, that this power shall be exercised in such manner as may from time to time be appointed by bye-laws made at a general court, and, in default of such bye-laws, by the governor, deputy governor and directors, or the major part of them; and also to a proviso, that in any place where banking shall be so carried on, on behalf of the said governor and company, any promissory note, issued on their account in such place, shall be made payable in coin in such place as well as in London (t). In addition to which enactments, with respect to branch banks, it has been since provided by 3 & 4 Will. IV. c. 98, that after 1st August, 1834, all the Bank of England's promissory notes on demand, which shall be issued at any place in England out of London, where banking shall be carried on, on behalf of the Bank of England, shall be made payable at the place where such notes shall be issued. And farther, that the Bank of England shall not be liable to

(s) So called also in the title of 1 & 2 Vict. c. 96, and 7 & 8 Vict. c. 113. As to joint stock companies in general,

see *Bramah v. Roberts*, 3 Bing. N. C. 971. Et vide sup. p. 182.

(t) 7 Geo. 4, c. 46, s. 15.

pay at a branch bank any note of the Bank of England not made specially payable there; but, on the other hand, shall be bound to pay in London all notes, whether those of the Bank of England itself, or its branches (u).

As to the introduction of the joint stock banks, the same statute 7 Geo. IV. c. 46 (x), provides, that after the passing of that act it shall be lawful for any corporation erected for the purpose of banking, or for any number of persons in co-partnership, though consisting of more than six, to carry on the trade of bankers, in England, and to issue their bills or notes at any places in England exceeding sixty-five miles from London, payable on demand, or otherwise, at some place or places specified upon such bills or notes, exceeding sixty-five miles from London, and not elsewhere (y). But it also enacts as follows:—that before any such corporation or co-partnership begin to issue bills or notes, and also in every year afterwards, an account or return shall be made out and delivered to the stamp office in London (z), to be there registered, setting forth, among other particulars, the names and places of abode of all the members, and of two or more persons being members and resident in England, who shall have been appointed *public officers* of such corporation or partnership, with their title of office or other description (a). Also, that all proceedings at law or in equity commenced by such co-partnership against any persons, whether members thereof or otherwise (b), or commenced by any persons, whether members or otherwise, against such co-partnership, shall be brought by or against such public officer as the nominal plaintiff or defendant, by whom such co-partnership shall be represented (c), but that every judg-

(u) Sects. 4, 6.

(x) On the subject of joint stock banks, see also 1 & 2 Vict. cc. 10, 96; 2 & 3 Vict. c. 68; 3 & 4 Vict. c. 111; 5 & 6 Vict. c. 85; 7 & 8 Vict. c. 113.

(y) Sect. 1.

(z) As to this return, see Edwards v. Buchanan, 3 B. & Adol. 788; Ar-

mitage v. Hamer, *ibid.* 793.

(a) Christie v. Peart, 9 Dowl. P.C. 291.

(b) Manners v. Rowley, 10 Sim. 471.

(c) Sect. 9. See Robinson v. Steward, 1 Man. & G. 511; Spiller v. Johnson, 6 Mee. & W. 570.

ment or decree against its public officer shall have the like effect against the property of the co-partnership and its members, as if such judgment or decree had been against the partnership itself; and that execution upon any judgment against the public officer of such corporation or co-partnership, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or co-partnership; and in case that shall be ineffectual (*d*), then (by leave of the court first obtained) against any person who, though no longer actually a member, was so at the time the contract was entered into, or before such contract was executed, or at the time of the judgment obtained, provided only that he shall not have ceased to be a member for three years (*e*).

Since this act, banks may be considered as having become subject to the distribution referred to at the outset of the chapter, that is, as consisting either of the *Bank of England* (including its *branches*), of *joint stock banks*, or of *private banks*; by the last of which terms are to be understood all banking establishments distinct from the Bank of England, and not registered as joint stock banks.

The Bank Charter had been originally limited to determine upon twelve months' notice after 1st August, 1705; but the period has been since from time to time enlarged by many successive acts of parliament (*f*). By one of these, already alluded to, the statute 3 & 4 Will. IV. c. 98, the former privileges are confirmed, subject to the modification they had received; but it is declared that any corporation or partnership, though consisting of more than six, may carry on banking in London, or within sixty-five miles thereof, provided that it do not borrow, owe, or take

(*d*) *Eardley v. Law*, 12 Ad. & El. 802.

(*e*) Sect. 13. As to the mode of proceeding to execution under this section, see *Ransford v. Bosanquet* (in error), 2 Ad. & El. N. S. 972; and see *Cross v. Law*, 6 Mee. & W. 217.

(*f*) See the following acts: 3 Geo. 1, c. 8; 15 Geo. 2, c. 13; 24 Geo. 2, c. 4; 4 Geo. 3, c. 25; 21 Geo. 3, c. 60; 39 & 40 Geo. 3, c. 28; 55 Geo. 3, c. 16; 56 Geo. 3, c. 96; 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32.

up in England any money on their bills or notes payable on demand, or at less than six months from the borrowing. And the act reserves a power to any corporation or partnership carrying on business beyond the radius of sixty-five miles, and not having any house of business or establishment as bankers in London, or within the radius, to make and issue their bills and notes, payable on demand or otherwise, at the place where issued (being beyond the radius), and also in London; and to have an agent or agents in London, or at any other place at which such bills or notes shall be made payable, for the purpose of payment only (*g*). But it is provided that no such bill or note shall be for any sum less than 5*l.*, or be re-issued in London or within sixty-five miles thereof (*h*).

This act also contains the following regulation: that after the 1st August, 1834, unless and until the legislature shall otherwise direct, tender of a note of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount therein expressed, for all sums above 5*l.*, so long as such bank shall continue to pay, on demand, their notes in legal coin; but subject to a proviso that it shall not be a legal tender by the Bank itself or its branches (*i*).

Such was the history of the law relative to banks, prior to the passing of the new act of the present year, for farther continuance of the Bank Charter. But by this statute, 7 & 8 Vict. c. 32, great changes have been introduced. For it lays down a new system of regulation affecting not only the Bank of England, but all bankers whatever; its main object being to place the general circulation of the country upon a sounder footing, and to prevent as much as possible those fluctuations in the currency, to which many of our commercial embarrassments have been ascribed.

First, then, as to the *Bank of England*. This act con-

(*g*) 3 & 4 Will. 4, c. 98, s. 2. See also 3 & 4 Will. 4, c. 83.

(*i*) Sect. 8. As to tender, vide sup. vol. ii. p. 539.

(*h*) 3 & 4 Will. 4, c. 98, s. 1.

tinues its charter or exclusive privilege (subject to the modifications therein contained), but makes it determinable upon twelve months' notice to be given after 1st August, 1855, and upon re-payment of certain debts therein particularized. It also provides that the issue of its notes payable on demand shall hereafter be kept distinct from its general banking business; that it shall appropriate to its issue department securities to the value of 14,000,000*l.*, (including the debt due to it by the public,) and so much of its gold coin, and gold and silver (*k*) bullion, as is not required for its banking department; that thereupon there shall be delivered out of the issue department such an amount of bank notes as, together with those in circulation, shall be equal to the aggregate amount of the securities, coin and bullion so appropriated; that the whole amount of its notes in circulation shall be deemed to be issued on the credit of such securities, coin and bullion; that the amount of such securities shall not be increased except as after mentioned, but may be diminished as from time to time occasion may require; and that after such appropriation to its issue department, it shall not be lawful for the Governor and Company to issue notes, either into its banking department, or to any person whatever, save in exchange for other notes, or gold coin or bullion, or securities taken by the issue department under the provisions of the act. And farther, that an account of its securities, gold coin, bullion and notes in the issue department, and also of its capital stock and deposits, money and securities, in the banking department, shall be transmitted weekly to the commissioners of stamps and taxes, in such form as the act prescribes, and published by them in the London Gazette.

As to *banks of issue* (other than the Bank of England): the act provides that in future it shall not be lawful for any banker to draw, accept, make, or issue any bill or note, or engagement for the payment of money, payable to bearer on demand, or to borrow, owe, or take up any

(*k*) The silver bullion is not to exceed one-fourth of the gold coin and bullion.

money on his bills or notes payable to bearer on demand,—except that it shall be lawful for any banker, who on the 6th May, 1844, was carrying on the business of a banker, and was then lawfully issuing his own notes, to continue to issue them. But if he become bankrupt, or cease to carry on the business, or discontinue the issue of notes, either by agreement with the Bank of England, or otherwise, his privilege in this respect is at an end, and incapable of revival. It is also provided, that he shall not hereafter have in circulation a greater amount of notes than the average amount which he had circulated before the act; such average to be ascertained in such manner as the act provides. And farther, that if any such banker as last aforesaid shall cease to issue, it shall be lawful for her Majesty in council, upon application of the Bank of England, to authorize the Bank of England to increase the 14,000,000*l.* of securities in the issue department, in the proportion of two-thirds of the amount so withdrawn from circulation.

And lastly, as to *banks in general*: that every banker shall, on the 1st of January in every year, or within fifteen days after, make a return to the commissioners of stamps and taxes, of his name, residence, and occupation, and that of each of his partners, and the name of his firm, and the place where the business is carried on; and the commissioners shall, on or before 1st March, publish the same in some newspaper circulating either in the town or county.

And that for the future it shall be lawful for all partnerships, though exceeding six in number, carrying on the business of banking in London or within sixty-five miles thereof, to draw, accept, or indorse *bills of exchange, not being payable to bearer on demand*, any thing in the act of 3 & 4 Will. IV. c. 98, to the contrary notwithstanding.

By another act of this year, 7 & 8 Vict. c. 113, new provisions are also made for the regulation of joint stock banks. Besides others, which cannot be conveniently particularized within our present limits, it is enacted, that no such company established on or after 6th May, 1844, shall carry on business in England, unless the deed of

partnership shall contain such particulars as in the act set forth, and be in such form as shall be approved by the Board of Trade; nor unless the shares have been all subscribed for, the deed of partnership executed by all the shareholders, and the half of each share paid up; nor unless it shall have obtained from her Majesty letters-patent of incorporation, which she is empowered to grant (for a term of years not exceeding twenty) upon petition, such petition being first referred to the Board of Trade and a report made therefrom; nor unless a memorial shall have been filed with the commissioners of stamps, containing such particulars relative to such companies as in the act prescribed, which memorial is to be annually renewed. And as to the effect of such incorporation, it is provided, that it shall be without prejudice to the personal liability of individual shareholders, against whom execution may be taken out by leave of the court, provided an execution against the corporate property has been found to be ineffectual, and provided the individual proceeded against had not ceased to be a shareholder for three years before judgment was obtained.

As to banking partnerships of more than six persons, which were established before the 6th May, 1844, they remain, until they apply for such letters-patent as aforesaid, subject to the provisions of the former law relative to joint stock banks; with this additional provision, however, that such partnerships, established on the 6th May for the purpose of carrying on the business of bankers within sixty-five miles of London, and not within the provisions of that act, shall have the same powers and privileges of suing and being sued in the name of a public officer, and be subject to the same regulations for enforcing judgments obtained in such suits, as belong to companies carrying on business beyond that radius under 7 Geo. IV. c. 46 (*l*).

(*l*) Vide sup. p. 341; and as to 3, c. 184; 9 Geo. 4, c. 23; 7 & 8 stamps payable on notes, vide 55 Geo. Vict. c. 32, s. 7.

CHAPTER XIV.

OF THE LAWS RELATING TO THE REGISTRATION OF
BIRTHS, DEATHS, AND MARRIAGES.

THE registration of births, deaths and marriages, a practice so important in every country for the authentication of the civil rights of individuals, and the promotion of many objects connected with the science of political economy, has been but very recently introduced among us ; though another species of registration, having reference to baptisms, burials, and marriages, had been long in use, and is, in regard to the two former ceremonies, still in force. It is to this more antient method, which (as connected with the offices of the church, and originally directed by the canon law,) may be termed the *ecclesiastical*, that we shall first advert, and our attention will next be directed to the new method of registering births, deaths and marriages, which may be termed, by way of distinction from the former, the *civil*.

I. As to the ecclesiastical mode of registration.

This system is said to be coeval with the Protestant Church ; having been first established by Cromwell, Lord Vicegerent, 30 Hen. VIII. 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns ; and by a canon (*b*) in the time of James I., still in force, and by several statutes, particularly 52 Geo. III. c. 146, farther provisions were made for its regulation (*c*).

(*a*) Godolph. Abridg. 144.

(*b*) Canon 70, 1 Jac. 1, 1667.

(*c*) See also 6 & 7 Will. 3, c. 6, s. 24, and the Marriage Act, 4 Geo.

4, c. 76 ; the last of which was repealed, as far as regards the subject of registration and marriages, by 6 & 7 Will. 4, c. 86, s. 1.

This statute, so far as it relates to the registry of *marriages*, was repealed (*d*) on the introduction of the civil method, hereafter to be described, but still remains in force as regards *baptisms* and *burials*, and provides, that registers of public and private baptisms and burials solemnized according to the rites of the established church, in any parish or chapelry in England, shall be made (within seven days after the celebration of the same) (*e*) by the rector, vicar, curate, or other officiating minister of the parish, in books of parchment or durable paper, wherein such particulars shall be inscribed, and in such form and manner, as by the schedule to the act annexed is set forth (*f*).

In cases where the baptism or burial is performed in any place other than the parish church or church-yard, by a clergyman not being the rector, vicar, or curate of the parish, he must transmit on that or the following day a certificate that he has performed such ceremony, to the minister of the parish, who shall duly enter it among the parish registers (*g*).

The books wherein such entries are made are to be carefully preserved by the officiating minister in a dry well-painted iron chest, and are not to be removed therefrom except for the purpose of making such entries, or other such specific purposes as mentioned in the act (*h*).

An annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the registrar of the diocese, who is bound to make report to the bishop whether he has duly received such copy or not (*i*); and alphabetical lists of the entries are directed to be made out by the registrar, which are to be open to public search at reasonable times upon payment of certain fees (*k*).

(*d*) 6 & 7 Will. 4, c. 86, s. 1.

(*e*) 52 Geo. 3, c. 146, s. 3.

(*f*) Sect. 1.

(*g*) Sect. 4.

(*h*) Sect. 5.

(*i*) Sects. 7, 8.

(*k*) Sect. 12.

It is farther enacted, that any person who knowingly inserts any false entry into these registers or the certified copies, or who forges any part thereof, or wilfully destroys the same, or knowingly certifies any fraudulent or defective copy, shall be guilty of felony, and subject to transportation for fourteen years (*l*).

II. Of the civil system of registration.

The above is a succinct account of the ecclesiastical and more antient method of registration; but the entries thereby obtained were found in fact to be often both incomplete and inaccurate, and otherwise inadequate to the purposes designed, being (among other objections) commemorative not of births and deaths generally, but only of such as are attended with the proper ceremonies of the church. Accordingly, on the 28th March, 1833, a committee of the House of Commons was appointed to consider and report upon “the general state of parochial registers, “and the laws relating to them, and on a general registration of births, baptisms, deaths, and marriages in “England and Wales;” and the report of this body led to the introduction (wholly independent of and co-existent with the method for registering baptisms and burials above-mentioned) of the system for registering *births, marriages and deaths*, which we are about to describe.

The statutes which contain the law upon this subject are the 6 & 7 Will. IV. c. 86 (considered as one act with the preceding chapter of the same year, intituled “An Act for Marriages in England” (*m*)); 7 Will. IV. & 1 Vict. c. 22; and 3 & 4 Vict. c. 92.

By these acts the guardians of every poor law union throughout England and Wales (or the poor law commissioners in the case of places not possessing a board of guardians (*n*)) are directed to divide the union or parish, of which they have the care, into as many districts as they shall think proper (subject, in case of a division by

(*l*) Sect. 14.

(*m*) 6 & 7 Will. 4, c. 85, s. 44.

(*n*) Sect. 10.

guardians, to the approval of the registrar-general hereinafter-mentioned), each of which districts is to be called by a distinct name, and shall possess a *registrar*, who shall be resident therein (*o*).

The *registrars* of each union are subjected to the supervision of their "superintendent registrar," an office to be filled as of right (in case of his due qualification and acceptance) by the clerk to the guardians of the union, during the pleasure of the registrar-general (*p*).

These "superintendent registrars" are in their turn subjected to the authority of an officer, to be appointed under the great seal, and to hold office during the pleasure of the crown, called "the registrar-general of births, deaths and marriages in England" (*q*), to whom, subject to such regulations as shall be made by a principal secretary of state (*r*), the general superintendence of the whole system and the practical details (where no specific directions are given by the acts) are entrusted.

Provision is also made by the acts for the establishment of a proper office in London, to be called the "General Register Office;" and register offices for each union (to be placed under the respective superintendents), for the preservation and safe custody of the registers when collected (*s*); and they contain regulations as to the uniform construction and durable materials of the *books* wherein the entries are to be made (*t*).

Such is an outline of the machinery of the system—the practical working out of which in the first instance depends, it will be seen, upon the *registrars*.

Their duties are threefold.

1. As to *births*. Every registrar is authorized and required to inform himself carefully of every birth which shall happen in his district, and to learn and register, as

(*o*) 6 & 7 Will. 4, c. 86, ss. 7,
10, 11, 16.

(*p*) Ibid. s. 7.

(*q*) Sect. 2.

(*r*) Sect. 5.

(*s*) Sect. 9.

(*t*) Sect. 17.

soon after the event as may conveniently be done, such particulars as are required by the schedule to the 6 & 7 Will. IV. c. 86, annexed, to be registered touching such birth (*u*): and the father or mother of any child born, or the occupier of any house in England wherein any child shall be born, *may*, within forty-two days after the day of such birth, give notice thereof to the registrar of the district (*x*); and within the same period, the father or mother of any child born in England, or, in case of their death or other inability, the occupier of the house, *shall*, upon being requested so to do (*y*), give information, to the best of his or her knowledge and belief, of the several particulars required to be known and registered touching the birth of such child (*z*).

After the expiration of the above-mentioned period of forty-two days, registration may still take place; but in this case a solemn declaration as to the truth of the particulars required must be made by the father or guardian, or some person present at the birth (*a*); and the entry of the birth must be signed not only by the registrar but the superintendent registrar; and a fee is payable to each of these officers by the person requiring the registry to be made (*b*). And after the expiration of six calendar months from the time of the birth, no registry thereof can upon any pretence be made except in the case of a child born at sea (*c*).

It is also to be observed, that on the registry of a baptized child, the baptismal name is one of the particulars required to be entered; and that where the child registered is not yet baptized, there is a provision authorizing the baptismal name to be added to the other particulars, at any time within seven days from the baptism, provided

(*u*) Sect. 18.

(*x*) Sect. 19.

(*y*) Upon pain of being liable to an indictment for a misdemeanor. R. v. Price, 11 Ad. & El. 727.

(*z*) Sect. 20.

(*a*) Sect. 22.

(*b*) Ibid.

(*c*) Sect. 23.

that ceremony has been performed within six calendar months after the registry took place (*d*).

The acts also contain these farther provisions,—that in case of the exposure of any new-born child, the overseers of the poor shall forthwith give notice thereof, and of the place where the child was found, to the registrar (*e*); and in the case of a birth at sea, information of the particulars required to be registered are to be forthwith minuted by the commander of the vessel, and on his arrival at any port in the United kingdom, certified by him to the registrar-general (*f*).

2ndly. As to *marriages*.—The forms as to the registration of marriages were incidentally described in a former part of the work, so far as to supersede the necessity of now recurring to them; and it therefore only remains to advert to the duties of the registrar,—

3dly. As to *deaths*.—Every registrar is authorized and required to inform himself carefully of every death which shall happen in his district, and learn and register, as soon after the event as conveniently may be done, such particulars concerning the same as in the schedule before mentioned contained (*g*): and the occupier of every house in England, in which any death shall happen, *may* within five days after the day of such death, give notice thereof to the registrar of the district (*h*); and some person present at the death, or in attendance during the last illness of any person dying in England, or in default of all such persons, the occupier of the house in which such death has happened (or if the occupier be the person dying, then some inmate), *shall*, within eight days after the day of the death, give information, upon being requested so to do, to the registrar, according to the best of his or her knowledge and belief, touching such particulars as are required to be known and registered touching the death; and in

(*d*) Sect. 24.

(*e*) Sect. 19.

(*f*) Sect. 21.

(*g*) Sect. 18.

(*h*) Sect. 19.

the case of an inquest upon the body, such information is to be conveyed to the registrar by the coroner before whom such inquest is held (*i*).

And it is farther enacted, that upon entering any death, the registrar is to deliver to the undertaker, or other person having charge of the funeral, a certificate of the due registration of the same, which is to be delivered over by him to the minister; provided always, that in case of inquests the coroner may order the body to be buried, if he think fit, before registry; and that every person who shall perform the service for the burial of a dead body for which no certificate shall have been delivered as aforesaid, either by the registrar or coroner, and who shall not within seven days give notice thereof to the registrar, shall incur a pecuniary penalty (*k*).

Also, that if any dead body shall be found at any time exposed, the coroner shall forthwith give notice thereof, and of the place where it was found, to the registrar (*l*). And in the case of the death of an English subject at sea on board of a British vessel, the commander shall forthwith make a minute of the several particulars required to be inserted in the register, and the name of the vessel; and on arrival of the vessel in the United Kingdom, or by an earlier opportunity if it occurs, send a certificate of such minute to the registrar-general (*m*).

And farther, that, four times in every year, each district registrar shall deliver to his superintendent a certified copy of all the entries made by him (*n*); and finally the register itself, upon the book being filled; and the superintendent, at the same intervals, is bound to transmit the same to the registrar-general (*o*).

The duties of this last-mentioned officer, into whose hands the documents thus ultimately fall, consist, in addition to the general supervision of the working of the

(*i*) Sect. 25.

(*k*) Sect. 27.

(*l*) Sect. 19.

(*m*) Sect. 26.

(*n*) Sect. 32.

(*o*) Sect. 34.

whole system, in examining, arranging and indexing the certified copies so sent, and in compiling abstracts of their contents, to be transmitted once a year to a principal secretary of state, by whom such abstracts are afterwards to be laid before parliament (*p*).

The abstracts which have been in fact delivered by the registrar-general, in pursuance of the duty last mentioned, are the more valuable from his having required that, in the registers of deaths, a medical statement in each instance of the *cause* of death should be annexed, in addition to the particulars required by the statute. This part of the information obtained under the new system, though sufficient time has yet scarcely elapsed to allow us to form a very accurate judgment of the extent of its utility, seems calculated to advance in a very important degree, the interests of mankind, by furnishing accurate data, upon a large scale, to those who are engaged in nosological inquiries, or in endeavours to improve the sanitary condition of the labouring classes.

Before we conclude this chapter, we may remark that at the time of the introduction of the new system of registration, certain commissioners were appointed for inquiring into the state and authenticity of any registers (other than parochial) which at that time existed. This commission, in the year 1840, had succeeded in discovering about 7000 which they deemed authentic; and the documents so discovered were, by 3 & 4 Vict. c. 92, placed under the care of the registrar-general, together with records of the marriages and baptisms performed in the Fleet and King's Bench prisons, and at other irregular places. And the same statute provides that all registers and records deposited in the general register office by virtue of that act, except such registers as therein particularized of marriages and baptisms at the Fleet and elsewhere, shall be deemed to be in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions of that act (*q*).

BOOK V.

OF CIVIL INJURIES.

CHAPTER I.

OF THE REDRESS OF CIVIL INJURIES BY THE MERE ACT OF THE PARTIES.

AT the opening of these Commentaries, the objects of municipal law were considered as consisting in the establishment and maintenance of the *rights* severally due to the different members of the community; rights having been previously defined as the liberties and advantages guaranteed by the implied contract of society to each individual, in return for his submission to those laws by which the same rights are secured to his fellow citizens (*a*). And this occasioned the distribution of our laws into two portions; one relating to *rights*, and the other to violation of rights, or (in more ordinary language) *wrongs*.

In the consideration of the first of these subjects, *rights* were distinguished into four kinds, viz. 1, Personal rights; 2, Rights of property; 3, Rights in private relations; 4, Public rights; which have respectively formed the subject of the four preceding Books of these Commentaries; and we are now therefore to proceed to the examination of *wrongs*, an inquiry evidently posterior in its nature to the former, as right is the positive idea of which wrong is the mere privation; and the two subjects stand in the same

(*a*) Vid. sup. vol. i. pp. 125, 129.

connexion with each other as *jus* with *injuria*, or *fas* with *nefas* (b).

Wrongs (as we had also occasion before to remark (c)) [are divisible into two sorts or species; *private wrongs*, and *public wrongs*.] The former (which are also [frequently termed *civil injuries*]) are the violation of private or public rights, when considered in reference to the injury sustained by the individual, and consequently as subjects for civil redress or compensation; the latter (usually denominated *crimes*) are the violation of private or public rights, when considered in reference to their evil tendency as regards the community at large, and accordingly visited with *punishment* (d). [To investigate the first of these species of wrongs, with their legal remedies,] or modes of redress, [will be our employment in the present Book, and the other species will be reserved till the next or concluding volume.

The more effectually to accomplish the redress of civil injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this volume will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature, that some of them permit, and others re-

(b) 3 Bl. Com. 2.

(c) Vide sup. vol. i. p. 127.

(d) According to Blackstone, "the former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals. The latter are a breach and violation of public rights and duties which affect the whole community, considered as a com-

munity," 3 Bl. Com. 2. But there is an inaccuracy in this form of definition. It makes the difference depend on the nature of the right violated. But it is clear that a violation of the *same* right will sometimes amount to a civil injury, and sometimes to a crime, as in case of a battery.

[quire a more speedy remedy, than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentric kind of remedy; of which we shall first of all treat, before we consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species; first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law*; and, thirdly, that which arises from *suit* or *action* in courts, which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And, first, of the redress of private injuries, which is obtained by the mere act of the parties. This is of two sorts; first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both of which we shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is,

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray (e). For the law, in this case, respects the passions of the human mind, and when external violence is offered to a man himself, or those to whom he bears a near connexion, makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain.

(e) 2 Roll. Abr. 546; 1 Hawk. P. C. 131. But see Bac. Abr. Master and Servant (P), where it is observed

that on the master's right to defend the servant there has been a difference of opinion.

[It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force ; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly, it is held an excuse for breaches of the peace, nay, even for homicide itself(*f*) ; but care must be taken that the resistance does not exceed the bounds of mere defence and prevention ; for then the defender would himself become an aggressor.

II. *Recaption, or reprisal*, is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant : in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them ; so it be not in a riotous manner, or attended with a breach of the peace,] and so that he favour not the thief(*g*). [The reason for this is obvious, since it may frequently happen that the owner may have this only opportunity of doing himself justice : his goods may be afterwards conveyed away or destroyed, and his wife, children, or servants, concealed or carried out of his reach, if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property ; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social

(*f*) 1 Hale, P. C. 485, 486.

(*g*) 3 Inst. 134 ; Hal. Anal. s. 46.

[Justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person to take him, except he be feloniously stolen (*h*); but must have recourse to an action at law.

III. As recaption is a remedy given to the party himself, for an injury to his *personal* property, so, thirdly, a remedy of the same kind for injuries to *real* property, is by *entry* on lands, when another person without any right has taken possession thereof.] In this case (which depends in some measure on like reasons with the former), [the party entitled may make a formal but peaceable entry (*i*) on the lands, declaring that thereby he takes possession, which notorious act of ownership is equivalent to a feodal investiture by the lord; or he may enter on any part of it in the same county, declaring it to be in the name of the whole (*k*); but if it lies in different counties, he must make different entries, for the notoriety of such entry or claim to the *pares* or freeholders of Westmoreland, is not any notoriety to the *pares* or freeholders of Sussex. Also, if there be two disseisors, the party disseised must make his entry on both, or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both (*l*), for as their seisin is dis-

(*h*) *Higgins v. Andrews*, 2 Roll. R. 55, 56; *Masters and Powlie's case*, *ibid.* 208; 2 Roll. Abr. 565, 566.

(*i*) As to the time within which an entry may be made, after the right of

entry accrues, vide 3 & 4 Will. 4, c. 27. Et vide post, under the head of Limitation of Actions.

(*k*) Co. Litt. 417.

(*l*) *Ibid.* 252.

[tinct, so also must be the act which divests that seisin.] But no entry can in the nature of things be made on hereditaments *incorporeal* (*m*); and in every case where this remedy is available, it [must be pursued in a peaceable and easy manner; and not with force or strong hand (*n*). For if one turns or keeps another out of possession forcibly, this is an injury both of a civil and a criminal nature. The civil is remedied by immediate restitution; which puts the antient possessor *in statu quo*; the criminal injury or public wrong, by breach of the king's peace, is punished by fine to the king.] For by 5 Rich. II. st. 1, c. 8, 15 Rich. II. c. 2, and 8 Hen. VI. c. 9, forcible entries are prohibited; [and by the last of these statutes, upon complaint made to any justice of the peace, of a forcible entry, with strong hand, on lands or tenements; or a forcible detainer after a peaceable entry; he shall try the truth of the complaint by jury, and upon force found, shall restore the possession to the party so put out; and in such case, or if any alienation be made to defraud the possessor of his right (which is likewise declared to be absolutely void), the offender shall forfeit, for the force found, treble damages to the party grieved, and make fine and ransom to the king. But this, by a subsequent clause in the same statute, enforced by 31 Eliz. c. 11, does not extend to such as endeavour to keep possession *manu forti* after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim (*o*).]

IV. A fourth species of remedy by the mere act of the party injured is the *abatement*, or removal, of nuisances. What nuisances are, and their several species, we shall find a more proper place to inquire under some of the

(*m*) 3 Bla. Com. 206.

(*n*) *Newton v. Harland*, 1 Man. & G. 644.

(*o*) As to forcible entry and detainer,

see also 4 Inst. 176; 21 Jac. 1, c. 15;

R. v. Wilson, 3 Ad. & El. 817; *R.*

v. Harland, *ibid.* 826; *Newton v.*

Harland, 1 Man. & G. 644.

[subsequent divisions. At present we shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it (*p*),] nor occasion (in the case of a *private* nuisance (*q*)) any damage, beyond what the removal of the inconvenience necessarily requires (*r*). [If a house or wall is erected so near to mine that it stops my antient lights, which is a *private* nuisance, I may enter my neighbour's land and peaceably pull it down (*s*);] or if the boughs of my neighbour's tree are allowed to grow so as to overhang my land, which they had not been accustomed to do, I may, on his refusal to remove such part of them as are in that position, effect the removal myself (*t*). [Or if a new gate be erected across the public highway, which is a *common* (or *public*) nuisance, any of the king's subjects passing that way may cut it down, and destroy it (*u*). And the reason why the law allows this private and summary method of doing one's self justice is, because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case, in which the law allows a man to be his own avenger, or to minister redress to himself, is that of *distreining* cattle or goods for non-payment of rent or other duties; or, distreining another's cattle *damage feasant*, that is, doing damage or trespassing upon his land; the former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the

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| (<i>p</i>) 5 Rep. 101; 9 Rep. 55; | (<i>t</i>) Norris v. Baker, 1 Roll. Rep. |
| Houghton v. Butler, 4 T. R. 364. | 394; Lodie v. Arnold, ubi sup. As |
| (<i>q</i>) Lodie v. Arnold, 2 Salk. 458. | to trees overhanging public ways, vide |
| (<i>r</i>) Cooper v. Marshall, 1 Burr. | 5 & 6 Will. 4, c. 50, s. 65. |
| 261. | (<i>u</i>) James v. Hayward, Cro. Car. |
| (<i>s</i>) R. v. Rosewell, 2 Salk. 459. | 184. |

[thing itself, as it might otherwise be impossible at a future time to ascertain whose cattle they were that committed the trespass or damage.

As the law of distresses is a point of great use and consequence, it shall be considered with some minuteness : by inquiring, first, for what injuries a distress may be taken ; secondly, what things may be distrained ; and, thirdly, the manner of taking, disposing of, and avoiding distresses.

1. And, first, it is necessary to premise, that a distress (*x*), *districcio*, is the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed. 1. The most usual injury for which a distress may be taken, is that of non-payment of rent. It was observed in a former volume (*y*), that distresses were incident by the common law to every *rent service*, and by particular reservation to *rent charges* also ;] and that by statute 4 Geo. II. c. 28, the same remedy was also extended in general to *rents seck*, *rents of assize*, and *chief rents*. [So that now we may lay it down as an universal principle, that a distress may be taken for any kind of rent in arrear (*z*), the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it (*a*).] But as it is of the definition of rent, that its amount be certain or capable of being readily reduced by either party to certainty, so it is held that where the sum to be paid by the tenant is not fixed by agreement express or implied, but depends on what shall be considered as a reasonable compensation for the use of the premises, no

(*x*) The thing itself taken by this process, as well as the process itself, is in our law books very frequently called a distress.

(*y*) Vide sup. vol. ii. pp. 25, 28.

(*z*) Vide *Bradbury v. Wright*, 2 Doug. 624 ; *Newman v. Anderton*, 2 N. R. 224 ; *Buttery v. Robinson*, 3 Bing. 392. As to distress by the ex-

ecutor of a lessor seised in fee, see 32 Hen. 8, c. 37 ; 3 & 4 Will. 4, c. 42, s. 37.

(*a*) As to the time within which a distress must be made after the right accrues, vide 3 & 4 Will. 4, c. 27, ss. 2, 3, 42 ; *James v. Salter*, 2 Bing. N. C. 505 ; S. C. 3 Bing. N. C. 544.

distress for it can legally be made (*b*). [2. For neglecting to do suit to the lord's court (*c*), or other certain personal service (*d*), the lord may distrein of common right. 3. For amercements in a court leet a distress may be had of common right; but not for amercements in a court baron, without a special prescription to warrant it (*e*). 4. Another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds *damage feasant*, that is, doing him hurt or damage, by treading down his grass, or the like; in which case,] supposing the trespass not to be rendered excusable by the defective state of the fences, or the like (*f*), [the owner of the soil may distrein them,] while they so remain on his grounds, [till satisfaction be made him for the injury he has thereby sustained. 5. Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers (*g*)), or for the relief of the poor (*h*), remedy by distress and sale is given; for the particulars of which we must have recourse to the statutes themselves, remarking only that such distresses (*i*) are partly analogous to the antient distress at common law, as being repleviable and the like; but more resembling the common law process of execution, by seizing and selling the goods of the debtor under a writ of *fiery facias*;—of which hereafter.

2. Secondly; as to the things which may be distreined or taken in distress, we may lay it down as a general rule, that all chattels personal are liable to be distreined, unless

(*b*) *Regnait v. Porter*, 7 Bing. 451; *Warner v. Potchett*, 3 B. & Adol. 928; *Dunk v. Hunter*, 5 B. & A. 322. As to distreining for an *apportioned* rent, vide *Neale v. Mackenzie*, 1 Mee. & W. 758; *Revis v. Watson*, 5 Mee. & W. 255. As to the extent of the remedy by distress in cases of bankruptcy and insolvency, and as against execution creditors, see 6 Geo. 4, c. 16, s. 74; 7 & 8 Vict. c. 96, ss. 18, 67.

(*c*) Bro. Abr. tit. Distress, 15.
(*d*) Co. Litt. 96; 2 Saund. by Wms. 168, n. (1).
(*e*) Brownl. 36.
(*f*) 2 Saund. by Wms. 284 e, note (4); vide post, pp. 365, 366.
(*g*) Stat. 7 Ann. c. 10.
(*h*) Stat. 43 Eliz. c. 2; 17 Geo. 2, c. 38, s. 7; 4 & 5 Will. 4, c. 76, s. 99.
(*i*) *Hutchins v. Chambers*, 1 Burr. 589.

[particularly protected or exempted. Instead therefore of mentioning what things are distreinable, it will be easier to recount those which are not so, with the reason of their particular exemptions (*k*). And, 1, as every thing which is distreined is presumed to be the property of the wrong-doer, it will follow that such things wherein no man can have an absolute and valuable property (as dogs, cats, rabbits, and all animals *feræ naturæ*) cannot be distreined. Yet if deer (which are *feræ naturæ*) are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distreined for rent (*l*). 2. Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any distress,] in order to prevent the danger, which might otherwise arise, of a breach of the peace (*m*); [as an axe with which a man is cutting wood, or a horse while a man is riding him (*n*). But horses drawing a cart may (cart and all) be distreined for rent arrere.] 3. Things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade (*o*), [shall not be liable to distress: as a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house (*p*): or corn sent to a mill or a market. For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the owner of the house, but to his customers. But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact

(*k*) Co. Litt. 47.

(*l*) Davis v. Powel, C. B. Hil. 11 Geo. 2; Willes, 47.

(*m*) Storey v. Robinson, 6 Term R. 138; Co. Litt. 47.

(*n*) It is laid down by Blackstone, vol. iii. p. 8, on the authority of a case in 1 Sid. 440, that a horse may be distreined while his rider is upon

him. But the contrary is the law; Storey v. Robinson, ubi sup. And see Field v. Adames, 12 Ad. & El. 649.

(*o*) Simpson v. Hartopp, Willes, 512; 1 Smith's Leading Cases, 187; Muspratt v. Gregory, ubi sup.

(*p*) Read v. Burley, Cro. Eliz. 549.

[belong to the tenant or a stranger, are distreinable by him for rent(*q*): for otherwise a door would be open to infinite frauds upon the landlord; and the stranger has *his* remedy over by action on the case against the tenant, if by the tenant's default the chattels are distreined, so that he cannot render them when called upon. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken. If they are put in by consent of the owner of the beasts, they are distreinable immediately afterwards for rent arriere by the landlord. So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distreinable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence(*r*). But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distrein them till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have laid down and risen up to feed; which in general is held to be one night at least(*s*); and then the law presumes, that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. Yet, if the lessor or his tenant were bound to repair the fences, and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner; in this case, though the cattle may have been *levant* and *couchant*, yet they are not distreinable for rent till actual notice is given to the owner that they are there, and he neglects to remove them(*t*): for the law will not suffer the landlord to take advantage of his own or his tenant's

(*q*) So held as to a carriage standing in a livery stable, see *Fraucis v. Wyatt*, 3 Burr. 1498; *Crosier v. Tomkinson*, 2 Ken. 439. But as to cattle of a drover put in to graze on their way to market, see 2 Saund. by Wms.

290, n. (*f*) and *Muspratt v. Gregory*, ubi supra.

(*r*) Co. Litt. 47.

(*s*) Gilb. Distr. by Hunt, 3rd edit. 47.

(*t*) *Hemp v. Crewes*, 2 Lutw. 1580.

[wrong (*u*).] 4. Things in the custody of the law, such as property already taken *damage feasant* or in execution, are not distreinable (*x*). Nor, 5 (generally speaking), money; but it is otherwise should it be deposited in a *sealed bag* (*y*). [6. Nothing shall be distreined for rent, which may not be rendered again in as good plight as when it was distreined: for which reason milk, fruit, and the like, cannot be distreined; a distress at common law being only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distreined, because some damage must needs accrue in their removal: but a cart loaded with corn might; as that could be safely restored. But now, by statute 2 Wm. & M. c. 5, corn in sheaves or cocks, or loose in the straw, or hay in barns or ricks, or otherwise, may be distreined] for rent service (*z*), [as well as other chattels. 7. Things fixed to the freehold may not be distreined; as caldrons, windows, doors, and chimney-pieces (*a*); for they savour of the realty. For this reason also corn growing could not be distreined, till the statute 11 Geo. II. c. 19, empowered landlords to distrein corn, grass, or other products of the earth, and to cut and gather them when ripe (*b*).] Besides the preceding articles which are *absolutely* privileged, there are others which are privileged *sub modo*,—as 8thly, beasts of the plough (*averia caruæ*) and sheep, and instruments of husbandry; and 9thly, the instruments of a man's trade or profession; for example, [the axe of a carpenter, the books of a scholar, and the like.] As to all which the rule is, that they are

(*u*) See *Poole v. Longueville*, 2 Saund. 289.

(*x*) *Co. Litt.* 47 a; *Smith v. Russell*, 3 Taunt. 400; *Wright v. Dewes*, 1 Ad. & Ell. 641. See also 56 Geo. 3, c. 50, s. 6, exempting from distress crops and other produce sold under an execution pursuant to the directions of that statute.

(*y*) *Rol. Abr.* 667; *Vin. Abr. Dist.* (H); *Wilson v. Duckett*, 2 Mod. 61.

(*z*) Vide *Miller v. Green*, 8 Bing. 92.

(*a*) *Niblett v. Smith*, 4 T. R. 504.

(*b*) Trees or shrubs in a nursery-ground are not within this statute; *Clark v. Gaskarth*, 8 Taunt. 431.

exempt from distress, only provided there be other sufficient distress on the premises (c).

[Let us next consider, thirdly, how distresses may be taken, disposed of, or avoided.] And here it must be premised, that in modern times the law of distresses has undergone great alterations. [Formerly they were looked upon in no other light than as a mere pledge, or security, for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage feasant*, and for other causes, not altered by act of parliament: over which the distreinor has no other power than to retain them till satisfaction is made. But distresses for rent arriere being found by the legislature to be the shortest and most effectual method of compelling the payment of such rent, many beneficial laws for this purpose have been made in the present century; which have much altered the common law, as laid down in our antient writers.

In pointing out, therefore, the methods of distreining, we shall in general suppose the distress to be made for rent; and remark, where necessary, the differences between such distress and one taken for other causes.

In the first place, then, all distresses must be made *by day*(d), unless in the case of *damage feasant*; an exception being there allowed, lest the beasts should escape before they are taken(e). And, when a person intends to make a distress, he must, by himself or his bailiff, enter on the demised premises; formerly during the continuance of the lease, but now(f), if the tenant holds over, the landlord

(c) Co. Litt. 47 a; 2 Inst. 132; Gorton v. Falkner, 4 T. R. 565; Pigott v. Birtles, 1 Mee & W. 441; where it was held that, even though there be other sufficient distress, yet if it consist of growing crops, which are only distreinable by *statute*, the landlord may notwithstanding distrein things privileged *sub modo*. And see

Hutchins v. Chambers, 1 Burr. 589, where it was held that *averia curuæ* were distreinable for poor rate, even though there be other distress, on the principle that distress under the 43 Eliz. is in effect an execution.

(d) 7 Rep. 7 a.

(e) Co. Litt. 142.

(f) Stat. 8 Ann. c. 14.

[may distrein within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress(*u*). If the lessor does not find sufficient distress on the premises, formerly he could resort nowhere else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords.] And in general the distress must still be on the premises(*x*). [But now(*y*) the landlord may distrein any goods of his tenant, carried off the premises] fraudulently or clandestinely, wherever he finds them, within thirty days after, unless they have been *bonâ fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, forfeit double the value to the landlord. The landlord may also distrein,] for rent service(*z*), [the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. The landlord might not formerly break open a house to make a distress, for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door(*a*): and now(*b*) he may, by the assistance of the peace-officer of the parish, break open in the day time any place whither the goods have been fraudulently removed and locked up to prevent a distress: oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrein for an entire duty, he ought to distrein for the whole at once; and not for part at one time and part at another(*c*). But if he distreins for the whole, and there is not sufficient on the

(*u*) As to what is a continuing possession, *Taylorson v. Peters*, 7 A. & E. 110.

(*x*) *Buszard v. Capel*, 8 Bar. & Cres. 141.

(*y*) Stat. 9 Ann. c. 14; 11 Geo. 2,

c. 19.

(*z*) 11 Geo. 2, c. 19, s. 8. Vide *Miller v. Green*, 8 Bing. 92.

(*a*) Co. Litt. 161; Comberb. 17.

(*b*) Stat. 11 Geo. 2, c. 19.

(*c*) 2 Lutw. 1532.

[premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy(*d*).

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III. c. 4, if any man takes a great or unreasonable distress, for rent arrere, he shall be heavily amerced for the same. As if(*e*) the landlord distrains two oxen for twelve pence rent; the taking of *both* is an unreasonable distress; but if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them; but for homage, fealty, or suit and service, it is said that no distress can be excessive(*f*). For as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again. The remedy for excessive distresses is by a special action on the statute of Marlbridge; for an action of trespass is not maintainable upon this account, it being no injury at the common law(*g*).

When the distress is thus taken the next consideration is the disposal of it. For which purpose the things distrained must in the first place be carried to some pound, and there impounded by the taker. But, in their way thither, they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law: as if no rent be due, if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue(*h*). But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law(*i*).] And in case of distress *damage feasant*, it is enacted by 6 & 7 Vict. c. 30, that if any person shall

(*d*) Cro. Eliz. 13; stat. 17 Car. 2, c. 7; Hutchins v. Chambers, 1 Burr. 590.

(*e*) 2 Inst. 107.

(*f*) Bro. Abr. lit. Assize, 291, Prerogative, 98.

(*g*) 1 Vent. 104; Fitzgib. 85; Fisher v. Algar, 2 C. & P. 374, Hutchins v. Chambers, ubi supra.

(*h*) Co. Litt. 160, 161.

(*i*) Ibid. 47.

release or attempt to release cattle lawfully seized by way of such distress, from the pound or place where they shall be impounded, or on the way to or from such pound or place, or shall destroy such pound or place, or any part thereof, or any lock or bolt thereof, he shall, on conviction before two justices of the peace, be liable to a penalty not exceeding 5*l.*, and to payment of the reasonable charges and expenses.

[A *pound* (*parcus*, which signifies any inclosure,) is either pound *overt*, that is, open overhead; or pound *covert*, that is, close. By the statute 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19, which was made for the benefit of landlords, any person distreining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hac vice*, for securing of such distress (*j*).] If a live distress, of animals, be impounded, the owner is bound to provide the beasts with food and necessaries. But by 5 & 6 Will. IV. c. 59, ss. 4, 5, the impounder is bound, in default of the owner, to supply them with sufficient food; and entitled, by a proceeding before a justice of the peace, to recover from the owner a sum not exceeding double the value of the food supplied; or instead thereof shall be at liberty, after seven clear days, to sell the animals at public market (after giving three days' public printed notice thereof), and apply the produce to the repayment of the food and expenses, rendering the overplus to the owner. Any stranger, also, is authorized to enter a place where animals are impounded without sufficient food more than twenty-four hours, and supply

(*j*) Vide *Washborn v. Black*, 11 & Ald. 208; *Swann v. Earl Falmouth*, 8 Bar. & Cres. 456.
East, 405, n. (*a*); *Pitt v. Shew*, 4 B.

them, without being liable to an action for such entry (*k*). [A distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by weather, ought to be impounded in a pound covert, else the distreinor must answer for the consequences (*l*).

When impounded, the goods were formerly, as was before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held (*m*), that the distreinor is not at liberty to work or use a distreined beast. And thus the law still continues with regard to beasts taken damage feasant, and distresses for suit or services; which must remain impounded till the owner makes satisfaction; or contests the right of distreining, by replevying the chattels. To *replevy* (*replegiare*, that is, to take back the pledge) is, when a person distreined upon applies to the sheriff or his officers, and has the distress returned into his own possession; upon giving good security to try the right of taking it in a suit at law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distreinor. This is called a replevin, of which more will be said hereafter. At present we shall only observe, that, as the distress is at common law only in nature of a security for the rent or damages done, a replevin answers the same end to the distreinor as the distress itself; since the party replevying gives security to return the distress, if the right be determined against him.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, it is no remedy at all to the distreinor. But for a debt due to the crown, unless paid within forty days, the

(*k*) Co. Litt. 47.

547.

(*l*) Mason v. Newland, 9 C. & P. 575; Wilder v. Speer, 8 A. & E.

(*m*) Bagshawe v. Goward, Cro. Jac. 148.

[distress was always saleable at the common law (*m*). And for an amercement imposed at a court leet, the lord may also sell the distress (*n*): partly because, being the king's court of record, its process partakes of the royal prerogative (*o*); but principally because it is in the nature of an execution to levy a legal debt. And so in the several statute distresses, before mentioned, which are also in the nature of executions, the power of sale is likewise usually given, to effectuate and complete the remedy. And, in like manner, by several acts of parliament (*p*), in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security; the distreinor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges; rendering the overplus, if any, to the owner himself (*q*). And, by this means, a full and entire satisfaction may now be had for rent in arriere, by the mere act of the party himself, viz. by distress, the remedy given at common law; and sale consequent thereon, which is added by act of parliament.]

Before we quit this subject, it should be observed, that [the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for if any one irregularity was committed, it vitiated the whole, and made the distreinors trespassers *ab initio* (*r*). But now, by the statute 11 Geo. II. c. 19 (*s*), it is pro-

(*m*) Bro. Abr. tit. Distress, 71.

(*n*) 8 Rep. 41.

(*o*) Bro. Ibid.; R. v. Speed, 12 Mod. 330.

(*p*) 2 W. & M. c. 5; 8 Ann. c. 14; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19. As to distresses for small rents, 57 Geo. 3, c. 93. As to distresses for taxes, rates, &c., 7 & 8 Geo. 4, c. 17.

(*q*) Jacob v. King, 5 Taunt. 451;

Lyons v. Tomkies, 1 Mee. & W. 693. By 57 Geo. 3, c. 93, s. 6, every broker who makes a distress, in any case whatsoever, is to give a copy of his charges, &c. Hart v. Leach, 1 Mee. & W. 560.

(*r*) 1 Ventr. 37.

(*s*) Vide Gambrell v. Earl of Falmouth, 5 Ad. & El. 403.

[vided, that for any unlawful act done the whole shall not be unlawful, or the parties trespassers *ab initio*; but that the party grieved shall only have an action for the real damage sustained; and not even that if tender of amends is made before any action is brought.

VI. The seizing of heriots (*t*), when due on the death of a tenant, is also another species of self-remedy; not much unlike that of taking cattle or goods in distress. As for that division of heriots which is called heriot service, and is only a species of rent, the lord may distrein for this, as well as seize; but for heriot custom, (which Sir Edward Coke says (*u*) lies only in *prender*, and not in *render*,) the lord may seize the identical thing itself, but cannot distrein any other chattel for it (*x*). The like speedy and effectual remedy, of seizing, is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the persons entitled thereto may seize, without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other, and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature as might be out of the reach of the law before any action could be brought.

These are the several species of remedies, which may be had by the mere act of the party injured. We shall next briefly mention such as arise from the joint act of all the parties together. And these are only two,—*accord* and *arbitration*.

I. *Accord* is] an agreement, [between the party injuring and the party injured,] to make satisfaction; [which, when performed, is a bar of all actions upon this account. As

(*t*) As to heriots, vide sup. vol. ii.
p. 48.

(*u*) Cop. s. 25.

(*x*) *Odibam v. Smith*, Cro. Eliz.
590; *Major v. Brandwood*, Cro. Car.
260.

[if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action; but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action (*y*).] But it is to be observed under this head, first, that the action will not be taken away by mere accord without actual satisfaction. For example, in the case supposed, the mere agreement to accept the sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse; for this would only be substituting one right of action for another. Secondly, that the taking a smaller sum of money, in lieu of a greater, does not amount to the legal idea of satisfaction. Thus, if a man owe 100*l*. an accord or agreement between him and the creditor to pay 50*l*. in satisfaction, will not, though the latter sum be actually paid, suffice to bar the action on the original debt (*z*).

[II. *Arbitration* (*a*) is where the parties injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong, to the judgment of two or more *arbitrators*, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as *umpire* (*imperator* or *impar* (*b*)), to

(*y*) 9 Rep. 79.

(*z*) Wright *v.* Acres, 6 A. & E. 726; Bayley *v.* Homan, 3 B. N. C. 920. As to the nature of an accord, see Wilkinson *v.* Byers, 1 A. & E. 106. As to the doctrine that an accord between the defendant and one of the plaintiffs, and *vice versâ*, is good, see Wallace *v.* Kelsall, 7 M. & W. 264. As to an accord by a *stranger*, see Thurman *v.* Wild, 11 A. & E. 453.

(*a*) Under the head of arbitration, the cases in the books are extremely

numerous. The following, of recent date, may be consulted with advantage: R. *v.* Bardell, 5 A. & E. 619; Hayward *v.* Phillips, 6 A. & E. 119; Moore *v.* Butlin, 7 A. & E. 595; Re Story, *ibid.* 602; Jones *v.* Corry, 5 Bing. N. C. 187; Turner *v.* Swainson, 1 Mee. & W. 572; Reade *v.* Dutton, 2 Mee. & W. 69; Platt *v.* Hall, *ibid.* 391.

(*b*) Whart. Angl. Sacr. i. 772; Nichols, Scot. Hist. Libr. c. i. *prope finem*.

[whose sole judgment it is then referred : or frequently there is only one arbitrator originally appointed. This decision, in any of these cases, is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice (c). But the right of real property cannot thus pass by a mere award (d); which subtilty, in point of form (for it is now reduced to nothing else), had its rise from feudal principles ; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land ; and it will be a breach of the arbitration bond to refuse compliance (e). For though originally the submission to arbitration used to be,] and may still be, [by word or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named,] or, in default thereof, to pay a certain penalty. [And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions which are difficult, and almost impossible, to be adjusted on a trial at law, the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought, enacting by statute 9 & 10 Will. III. c. 15, that all merchants and others, who desire to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), may agree that their submission (f) of the action or suit to arbitration or umpirage shall be made a rule of any of the king's

(c) Brownl. 55 ; 1 Freem. 410.

(d) 1 Roll. Abr. 242 ; Marks v. Marriott, 1 Ld. Raym. 115.

(e) See Doe v. Rosser, 3 East, 15.

(f) If the submission be not in writing, the case is not within the act, — v. Mills, 17 Ves. 419.

[courts of record, and may insert such agreement in their submission, or promise, or condition of the arbitration bond: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive: and after such rule made, the parties disobeying the award shall be liable to be punished as for a contempt of the court, unless such award shall be set aside for corruption] or undue means used in its procurement, [or other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And in consequence of this statute, it is now become a considerable part of the business of the superior courts to set aside such awards when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt as is awarded for disobedience of those rules and orders which are issued by the courts themselves.]

The law on this subject has also been much improved by more recent enactments, it being provided by 3 & 4 Will. IV. c. 42, that the power of any arbitrator or umpire appointed in pursuance of a submission containing such agreement as aforesaid to make the arbitration a rule of court, or appointed by any rule of court or judge's order, or order of nisi prius, in any action, shall not be revocable by either party without leave of the court; and that the court or a judge may command the attendance of witnesses before the arbitrator, whose failure to attend shall be deemed a contempt of court; and that if in any such submission, rule or order of reference, it shall be agreed or ordered that the witnesses shall be examined on oath, the arbitrator is required to administer such oath accordingly; and any witness giving false evidence shall be deemed guilty of perjury.

As to the effect of an award, when made and not set aside by the court for invalidity, it is in general conclusive and final; and upon an action or other proceeding to enforce it, no objection to its validity can be made, unless

in respect of such defect as may happen to be apparent *on the face of the award itself*; the rule being, that all *extrinsic* objections must be taken in the shape of an application to set the award aside (*h*); which application must be made before the last day of the term next after the award is made and published (*i*).

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| (<i>h</i>) Braddick v. Thompson, 8 East, | 52. |
| 344; Paull v. Paull, 2 Dowl. 340; | (<i>i</i>) 9 & 10 Will. 3, c. 15, s. 2; |
| Grazebrook v. Davis, 5 B. & C. 534; | Young v. Timmins, 1 Tyrw. 230, n. |
| Macarthur v. Campbell, 2 Ad. & El. | |

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.



[THE remedies for private wrongs, which are effected by the mere operation of the law, will fall within a very narrow compass, there being,] it is believed, [only two instances of this sort] capable of being suggested ; [the one, that of *retainer*, where a creditor is made executor or administrator to his debtor ; the other, in the case of what the law calls *remitter*.]

I. As to *retainer*. The law relating to executors and administrators has been already discussed in a former part of the work (*a*), where it appeared that [if a person indebted to another makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are not of equal degree (*b*). This is a remedy by the mere act of law, and grounded upon this reason, that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity ; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides.] For every other creditor but himself is in a condition to commence an action and obtain judg-

(*a*) Vide sup. vol. ii. p. 239.

(*b*) Ibid. 247 ; et vide 1 Rol. Abr.

922 ; Plowd. 543 ; Glaholm v. Rowntree, 6 A. & E. 710.

ment for recovery of his debt. The effect, however, of this right of retainer (it will be observed) is to put them in some measure in a *better* position than others; because it enables him to obtain payment *first* (among all creditors of equal degree), and before any other has had time to commence an action. And this seems to illustrate a remark of Lord Bacon, that [the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse (c).] [But the executor shall not retain his own debt in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion (d). Nor shall an executor of his own wrong be in any case permitted to retain (e).]

II. *Remitter* is where he who hath the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and of course defective title; in this case he is remitted, or sent back, by operation of law, to his antient and more certain title (f). The possession which he hath gained by a bad title shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent (g). As, if A. disseises

(c) Bac. Elem. c. 9.

(d) Vin. Abr. tit. Executors, D. 2.

(e) 5 Rep. 30.

(f) Litt. ss. 659, 693, 695; Co. Litt. 363 b; Gilb. Ten. 129. As to the effect of the Statute of Uses in

modifying the doctrine of *remitter*, vide 1 Saund. Uses, 166. As to *remitter* generally, Doe v. Woodroffe, 10 Mee. & W. 608.

(g) Co. Litt. 358; Wood v. Sir J. Shurley, Cro. Jac. 409.

B.; that is, turns him out of possession, and afterwards demises the land to B. (without deed) for term of years, by which B. entereth, this entry is a remitter to B. (*h*), who is in of his former and surer estate. But if A. had demised to him for years by deed indented or by matter of record, there B. would not have been remitted. For if a man by deed indented takes a lease of his own lands, it shall bind him to the rent and covenants; because a man can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting. The same law, if it had been by matter of record; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert (*i*).

[The reason given by Littleton (*h*), why this remedy, which operates silently and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article, because otherwise he who hath right would be deprived of all remedy.] For as he himself is in possession of the land, there is no other person upon whom he can make entry (*l*).

[And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced as not to make it possible to apply for redress in the usual and ordinary methods.]

(*h*) Litt. s. 695; Gilb. Ten. 129.

(*i*) Gilb. Ten. ubi sup.

(*k*) Litt. s. 661; Co. Litt. by Butl. 347 b, n. (1).

(*l*) Blackstone treats of *remitter* as if it had no application except to the case where the disseisee was out of possession under such circumstances that he could only recover possession by *real action*. But it was also applicable (as it still is) to the case stated in the text, of his being out of possession, with right of recovering posses-

sion by *entry*. (Litt. s. 693; Gilb. Ten. 129; Co. Litt. by Butl. 347 b, n. (11).) And now, in consequence of that recent and important change of the law, by which real actions are abolished (a subject to which we shall have occasion to refer more particularly hereafter), the former case can no longer arise, and it is *only* in the latter (altogether passed by in Blackstone) that any example of *remitter* can occur.

CHAPTER III.

OF THE COURTS IN GENERAL.

[THE next object of our inquiries is the redress of injuries by *suit in courts*: wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument, by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although, in the several cases of redress by the act of the parties mentioned in a former chapter (*a*), the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation required a more expeditious remedy than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands, on which I have a right of entry, or may demand possession by] an action of ejectment: [I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrein for rent, or have an

(*a*) Chap. 1.

[action of debt, at my own option : if I do not distrein my neighbour's cattle *damage feasant*, I may compel him by action of trespass to make me a fair satisfaction : if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it, though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, must indisputably suppose a previous right of obtaining redress some other way, which is given up by such agreement. But as to remedies by the mere operation of law, those are indeed given, because no remedy *can* be ministered by action] or entry, [without running into the palpable absurdity of a man's bringing an action against,] or entering upon, [himself.]

[In treating of the remedies by suit in courts, we shall pursue the following method : first, we shall consider the nature and several species of courts of justice ; and, secondly, we shall point out what injuries are cognizable and how redressed, in each respective species of court.

First, then, of courts of justice. And herein we will consider, first, their nature and incidents in general ; and, then, the several species of them erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered (*b*). And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown (*c*). For whether created by act of parliament, or letters-patent, or subsisting by prescription, (the only methods by which any court of judicature (*d*) can exist,) the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is sup-

(*h*) Co. Litt. 58.

(*d*) Co. Litt. 260.

(*c*) Vide sup. vol. ii. p. 525.

[posed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review.

All these in their turns will be taken notice of in their respective places: but we may here mention one distinction that runs throughout them all; *viz.* that some of them are courts *of record*, others *not of record*. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony; which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question (*e*). For it is a settled rule and maxim, that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary (*f*). And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity (*g*); and therefore] every court of record has authority to fine and imprison for contempt of its authority (*h*); while on the other hand [the very erection of a new jurisdiction, with power of fine or imprison-

(*e*) As to records vide Co. Litt. by Harg. 260, n. (1); sup. vol. i. c. 47.

(*f*) Co. Litt. 260.

(*g*) Finch, L. 231.

(*h*) 8 Rep. 38 b; R. v. Clement, 4 B. & Ald. 233; R. v. Davison, *ibid.* 337.

[ment, makes it instantly a court of record (*i*).] But the courts not of record, or those of them at least in which the common law is administered, are of inferior dignity and in a less proper sense the king's courts—and these are not intrusted by the law with any power to fine or imprison (*j*) the subjects of the realm, unless by the express provision of some act of parliament. In these also [the proceedings are not enrolled or recorded; but as well their existence, as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (*k*).

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. It is also usual in the higher courts to have attorneys and counsel as assistants.

An attorney at law] (called in the courts of equity a solicitor) [answers to the *procurator*, or proctor, of the civilians and canonists (*l*). And he is one who is put in the place, stead, or *turn* of another, to manage his proceedings in a cause. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit, (according to the old Gothic constitution (*m*),) unless by special licence under the king's letters patent (*n*).] And an infant, a married woman, or an idiot, cannot to this day, in point of *form*, appear by attorney; but even when an attorney is actually employed for them, should be described as ap-

(*i*) *Groenvelt v. Burwell*, Salk. 200; *Grenville v. College of Physicians*, 12 Mod. 388.

(*j*) *Dyson v. Wood*, 3 Barn. & Cres. 449.

(*k*) 2 Inst. 311; 8 Rep. 38 b; 11 Rep. 43 b; 3 Bl. Com. 24.

(*l*) Pope Boniface VIII., in 6 Decretal. l. 3, t. 16, s. 4, speaks of "*procuratoribus, qui in aliquibus partibus atornati nuncupantur*."

(*m*) Stiernhook, De Jur. Goth. l. i. c. 6.

(*n*) F. N. B. 25.

pearing in person or by guardian, according to the nature of the case (*o*). [But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, ceperunt homines per procuratores litigare*" (*p*), so with us, upon the same principle of convenience, it is now permitted in general (*q*), that attorneys may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts (*r*); and are in all points officers of the respective courts in which they are admitted: and, as they have many privileges on account of their attendance there (*s*), so they are peculiarly subject to the censure and animadversion of the judges.] But as to the particular regulations applicable to attorneys and solicitors we must refer the reader to a former chapter, in which we had occasion to consider this matter in detail.

Of counsel, called, among the civilians, advocates, there are in our courts of common law and equity [two species or degrees: barristers and serjeants. The former are admitted after a considerable period of study, or at least standing, in the Inns of Court (*t*); and are in

(*o*) Bro. Abr. t. Ideot, 4; Co. Litt. 135 b; 2 Saund. 212, n. (4); Beverley's case, 4 Rep. 124 b; Oulds v. Sansom, 3 Taunt. 261. A lunatic, however, may appear by attorney. Beverley's case, ubi sup.; Humphreys v. Griffiths, 6 Mee. & W. 89.

(*p*) Inst. 4, tit. 10.

(*q*) According to Blackstone this was first permitted by stat. Westm. 2, c. 10, (see 3 Bl. Com. 26). It was provided, however, by a previous statute, (statute of Merton, 20 Hen. 3, c. 10,) that every freeman might make attorney in suit to the court of the county, tilhing, hundred and wapentake, or the court of his lord. And even in the time of Hen. II., a party

who had appeared in person might afterwards appoint an attorney (*responsalis*) to represent him in the cause. Glan. lib. xi. c. 1.

(*r*) So early as the statute 15 Edw. 2, regulations were made as to the admission of attorneys; and by 4 Hen. 4, c. 18, (both now repealed by 6 & 7 Vict. c. 73, sched. part 1,) it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty.

(*s*) As to the privilege of being sued in their own court, vide Lewis v. Kerr, 2 Mee. & W. 226.

(*t*) Vide sup. vol. i. p. 20.

[Our old books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing; at which time, according to Fortescue (*y*), they might be called to the state and degree of serjeants, or *servientes ad legem*. How antient and honorable this state and degree is, with the form, splendour, and profits attending it, hath been so fully displayed by many learned writers (*z*), that it need not be here enlarged on.] It is sufficient to [observe, that serjeants at law are bound by a solemn oath (*a*) to do their duty to their clients: and that by custom (*b*) the judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench (*c*). From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney and solicitor general. The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee (*d*); so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles II. (*e*) These king's counsel answer in some measure to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special licence (*f*); in which restriction

(*y*) De LL. c. 50.

(*z*) Fortesc. c. 50; 10 Rep. pref.; Dugdal. Orig. Jurid.; Case of the Serjeants, 6 Bing. N. C. 235. To which may be added a tract by the late Serjeant Wynne, printed in 1765, entitled "Observations touching the Antiquity and Dignity of the Degree of Serjeant at Law;" and a late publication on the same subject, by Mr. Serjeant Manning.

(*a*) 2 Inst. 214.

(*b*) Fortesc. c. 50.

(*c*) Blackstone thinks that "the original of this was probably to qualify the puisné barons of the Exchequer to become justices of assize, according to the exigence of the statute 14 Edw. 3, c. 16." 3 Bl. Com. p. 27.

(*d*) See his Letters, 256.

(*e*) See his Life by Roger North, 37.

(*f*) Hence none of the king's counsel can publicly plead in court for a

[they agree with the advocates of the fisc (*g*); but in the imperial law the prohibition was carried still farther, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject (*h*). A custom has of late years prevailed of granting letters patent of precedence to such barristers, as the crown thinks proper to honour with that mark of distinction; whereby they are entitled to such rank and pre-audience (*i*) as are assigned in their respective patents: sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen consort's attorney and solicitor general (*j*)) rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts: but receive no salaries, and are not sworn; and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscri-

prisoner, or a defendant in a criminal prosecution, without a licence, which is never refused, but an expense of about 9*l.* must be incurred in obtaining it.—Christian's Black. vol. iii. p. 27, n. (*n*).

(*g*) Cod. 2, 2, 1.

(*h*) Ibid. 2, 7, 13.

(*i*) Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence at the bar.

1. The king's (or queen's) attorney general. By the king's mandate, 14th December, 1814, the attorney and solicitor-general are to have place and audience before the king's premier serjeant. See 6 Taunt. 424. In the time of Blackstone they took rank after him, and also after the king's antient serjeant and the king's advocate-general.

2. The king's solicitor general.

3. The king's premier serjeant, (so constituted by special patent.)

4. The king's antient serjeant, or the eldest among the king's serjeants.

5. The king's advocate general.

6. The king's serjeants.

7. The king's counsel, with the queen consort's attorney and solicitor.

8. Serjeants at law.

9. The recorder of London.

10. Advocates of the civil law.

11. Barristers.

In the Court of Exchequer two of the most experienced barristers, called the *post-man* and the *tub-man* (from the places in which they sit), have also a precedence in motions. See *R. v. Bishop of Exeter*, 7 Mee. & W. 188.

(*j*) Seld. Tit. Hon. 1, 6, 7.

[minately (except in the Court of Common Pleas, where serjeants only are admitted (*k*)) may take upon them the protection and defence of any suitors, whether plaintiff or defendant; who are therefore called their *clients*, like the dependants upon the antient Roman orators. Those indeed practised *gratis*, for honour merely, or at most for the sake of gaining influence: and so likewise it is established with us (*l*) that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*m*): as is also laid down with regard to advocates in the civil law (*n*), whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l*. of English money (*o*). And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless (*p*):

(*k*) By this is to be understood the court *in banc*; for the exclusive privilege of the serjeants does not extend to sittings at *nisi prius*. By warrant under the sign manual, in 1834, it was directed that the exclusive privilege of the serjeants should cease; but the Court of Common Pleas afterwards decided, that being founded on immemorial usage, it could not be taken away by the warrant of the crown. *Case of the Serjeants*, 6 Bing. N. C. 235. By statute, however, 6 & 7 Vict. c. 18, s. 61, it has been lately enacted, that in the particular case of appeals to the Common Pleas from the decisions of the revising barristers, on

the right of voting at parliamentary elections, all barristers shall be entitled to audience. And as to the right of the attorney-general to be heard in the Common Pleas in cases where the crown is concerned, see *Paddock v. Forester*, 8 Dowl. 834; S. C. 1 Man. & G. 587.

(*l*) Davis, pref. 22; 1 Ch. Rep. 38.

(*m*) Davis, 23.

(*n*) Ff. 11, 6, 1.

(*o*) Tac. Ann. 1, 11, 7.

(*p*) Vide *Hodgson v. Scarlett*, 1 B. & Ald. 232. But the subsequent publication of such matter is unlawful. *Flint v. Pike*, 4 B. & C. 473.

[but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured (*q*). And counsel guilty of deceit or collusion are punishable, by the statute Westm. 1, 3 Edw. I. c. 28, with imprisonment for a year and a day, and perpetual silence in the courts; a punishment] that even in modern times has been [inflicted for gross misdemeanors in practice (*r*).]

We shall close this chapter with a remark applicable both to attorneys and counsel, viz. that they possess the exclusive privilege of transacting business in the courts of justice in matters in which they are not personally concerned. For no man can conduct the practical proceedings in a cause to which he is himself not party, except he be an attorney (*s*); nor be allowed to address the court in such a cause, unless he be either attorney or counsel (*t*). In the superior courts, indeed, the latter province belongs to counsel alone, exclusively even of the attorneys (*u*).

(*q*) *Brook v. Sir H. Montague*, Cro. Jac. 90.

(*r*) Ray. 376.

(*s*) Vide 6 & 7 Vict. c. 73, s. 2.

(*t*) As to this privilege in the case of proceedings before the under-sheriff, vide *Tribe v. Wingfield*, 2 Mee. & W. 128.

(*u*) *Collier v. Hicks*, 2 B. & Ad.

668. This privilege of counsel is of very antient date. Plac. Ab. 137; Kanc. Rot. 22, temp. 32 Hen. 3; Matt. Par. Hist. p. 1077. We may remark here, that by 6 Geo. 4, c. 50, s. 2, practising barristers and attorneys are exempt from serving on juries; and by 5 & 6 Vict. c. 109, s. 6, exempt from serving as parish constables.

CHAPTER IV.

OF THE COURTS OF GENERAL JURISDICTION—AND,
FIRST, OF THOSE OF COMMON LAW AND EQUITY.

[WE are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. And these are either such as are of public and general jurisdiction throughout the whole realm; or such as are only of a private and special jurisdiction in some particular parts of it. Of the former there are four sorts:—the universally established courts of common law and equity (*a*); the ecclesiastical courts; the courts military; and courts maritime (*b*). And, first, of such public courts as are courts of common law and equity.

The policy of our antient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there are manors in the kingdom; wherein injuries were redressed, in an easy and expeditious manner, by the suffrage of neighbours and friends. These little courts, however, communicated with others of a

(*a*) As to the distinction between common law and equity, vide sup. vol. i. p. 78.

(*b*) The *ecclesiastical, military* and *maritime laws*, though founded on the imperial and canonical constitutions, are in one sense to be considered as

part of the *common law* of the realm, vide sup. vol. i. pp. 59, 60. It will be observed, however, that in the distinction above laid down, they are distinguished (as convenience usually requires) from the *common law*.

[larger jurisdiction, and those with others of a still greater power ; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones, and to determine such causes as, by reason of their weight and difficulty, demanded a more solemn discussion. The course of justice flowing in large streams from the king, as the fountain, to his superior courts of record ; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed. An institution that seems highly agreeable to the dictates of natural reason, as well as of more enlightened policy ; being equally similar to that which prevailed in Mexico and Peru before they were discovered by the Spaniards, and to that which was established in the Jewish republic by Moses. In Mexico, each town and province had its proper judges, who heard and decided causes, except when the point in litigation was too intricate for their determination ; and then it was remitted to the supreme court of the empire, established in the capital, and consisting of twelve judges (c). Peru, according to Garcilasso de Vega, (an historian descended from the antient Incas of that country,) was divided into small districts containing ten families each, all registered and under one magistrate ; who had authority to decide little differences and punish petty crimes. Five of these composed a higher class of fifty families ; and two of these last composed another, called a hundred. Ten hundreds constituted the largest division, consisting of a thousand families ; and each division had its separate judge or magistrate, with a proper degree of subordination (d). In like manner we read of Moses, that, finding the sole administration of justice too heavy for him, he “ chose able “ men out of all Israel, such as feared God, men of truth,

(c) *Mod. Un. Hist.* xxxviii, 469.(d) *Ibid.* xxxix. 14.

[“ hating covetousness ; and made them heads over the
 “ people, rulers of thousands, rulers of hundreds, rulers of
 “ fifties, and rulers of tens : and they judged the people
 “ at all seasons ; the hard causes they brought unto Moses,
 “ but every small matter they judged themselves” (*k*).
 These inferior courts, at least the name and form of them,
 still continue in our legal constitution : but as the superior
 courts of record have in practice obtained a concurrent
 original jurisdiction with these ; and as there is besides a
 power of removing complaints or actions thither from all the
 inferior jurisdictions ; upon these accounts (among others)
 it has happened that these petty tribunals have fallen into
 decay, and almost into oblivion : whether for the better
 or the worse may be matter of some speculation ; when
 we consider on the one hand the increase of expense and
 delay, and on the other the more able and impartial decision
 that follows from this change of jurisdiction.

The order we shall observe in discoursing on these
 several courts, constituted for the redress of *civil* injuries,
 (for with those of a jurisdiction merely *criminal* we are
 not at present concerned,) will be by beginning with the
 lowest, and those whose jurisdiction, though public and
 generally dispersed throughout the kingdom, is yet (with
 regard to each particular court) confined to very narrow
 limits ; and so ascending gradually to those of the most
 extensive and transcendent power.

I. The *court baron* (*l*) is a court incident to every
 manor in the kingdom, to be holden by the steward within
 the said manor. This court baron is of two natures (*m*) :
 the one is a customary court, of which we formerly
 spoke (*n*), appertaining entirely to the copyholders, in
 which their estates are transferred by surrender and admit-

(*k*) Exod. c. 18.

(*l*) 4 Inst. 268.

(*m*) Co. Litt. 58.

(*n*) Sup. vol. i. p. 208 ; vol. ii.
 p. 52.

[tance, and other matters transacted relative to their tenures only. The other, of which we now speak,] and of which we also took some notice in a former place (*n*), [is a court of common law, and it is the court before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, viz. the freeholders' court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feudal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks; and its most important business was to determine, by writ of right, all controversies relating to the right of lands within the manor.] But now by 3 & 4 Will. IV. c. 27, s. 36, all writs of right, and other real and mixed actions (except writs of right of dower, writs of dower, *quare impedit*, and ejectment), and all plaints in the nature of such actions (except plaints for dower or freebench), are abolished. [It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to 40*s.* (*o*); which is the same sum, of three marks, that bounded the jurisdiction of the antient Gothic courts in their lowest instance, or *fierding courts*, so called because four were instituted within every superior district or hundred (*p*). But the proceedings on a writ of right might be removed into the county court by a precept from the sheriff called a *tolt* (*q*), "*quia tollit atque eximit causam è curia baronum* (*r*).]" And the proceedings in all other actions may be removed into the superior courts by the king's writ of *pone*, or *accedas ad curiam*, according to the nature of the suit (*s*). After

(*n*) Sup. vol. i. pp. 202, 208.

(*o*) Finch, 248.

(*p*) Stiernhook, De Jure Goth. l. i. c. 2.

(*q*) F. N. B. 3, 4.

(*r*) 3 Rep. Pref.

(*s*) F. N. B. 4, 70; Finch, L. 444, 445.

[Judgment given, a writ also of *false judgment* (*u*) lies to the courts at Westminster, to rehear and review the cause; and not a writ of *error*, for this is not a court of record: and therefore, in some of these writs of removal, the first direction given is to cause the plaint to be recorded, *recor-dari facias loquelam* (*x*).] This court, however, has now fallen into almost entire disuse.

[II. A hundred court is only a larger court baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here also the judges and the steward the registrar, as in the case of a court baron. It is likewise no court of record; resembling the former in all points, except that in point of territory it is of a greater jurisdiction(*y*). This is said by Sir Edward Coke to have been derived out of the county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time(*z*); but its institution was probably coeval with that of hundreds themselves, which were formerly observed(*a*) to have been derived from the polity of the antient Germans. The *centeni* were the principal inhabitants of a district composed of different villages, originally in number an *hundred*, but afterwards only called by that name (*b*); and who probably gave the same denomination to the district out of which they were chosen. Cæsar speaks positively of the judicial power exercised in *their* hundred courts and courts baron. "*Principes re-*

(*u*) F. N. B. 18. As to writs of false judgment, see *Scott v. Bye*, 2 Bing. 344; *Walker v. Watson*, 8 Bing. 414; *Finch v. Brook*, 1 Bing. N. C. 253; *S. C.* 2 Bing. N. C. 324; *Overton v. Swettenham*, 3 Bing. N. C. 786; 1 Man. & Gr. 41, n. (*u*); *Crookes v. Longden*, 5 Bing. N. C. 410.

(*x*) 4 Inst. 267; Vin. Abr. Court,

G. (*a*).

(*y*) Finch, L. 248; 4 Inst. 267.

(*z*) 2 Inst. 71.

(*a*) Vol. i. p. 117.

(*b*) "*Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et, quod primo numerus fuit, jam nomen et honor est.*" Tac. De Mor. Germ. c. 6.

[*gionum, atque pagorum*, (which we may fairly construe, the lords of hundreds and manors,) *inter suos jus dicunt controversiasque minuunt*" (c). And Tacitus, who had examined their constitution still more attentively, informs us not only of the authority of the lords, but of that of the *centeni*, the hundredors, or jury; who were taken out of the common freeholders, and had themselves a share in the determination. "*Eliguntur in conciliis et principes, qui jura per pagos vicose reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt*" (d). This hundred court was denominated *haereda* in the Gothic constitution (e).] [Causes are equally liable to removal from hence, as from the common court baron, and by the same writs, and may also be reviewed by writ of false judgment.] But in practice no resort to this court is ever made.

[III. The county court (f) is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of 40s. (g). Over some of which causes] (viz. in trespasses for goods) [these inferior courts have, by the express words of the statute of Gloucester (h), a jurisdiction totally exclusive of the king's superior courts.] And in causes in general, if it appear that the sum for which the action is brought is less than 40s., the proceedings will be stayed unless it appear that the debt is not recoverable in any county court, or in any of those local courts, of which we shall speak hereafter, called courts of requests (i). [The county court might also hold plea of many real actions,] before such actions were abolished, and may still entertain [all personal actions to any amount, by virtue of a special writ called a *justicies*; which is a writ empowering

(c) De Bell. Gall. l. 6, c. 22.

(g) 4 Inst. 266.

(d) De Morib. Germ. c. 13.

(h) 6 Edw. 1, c. 8.

(e) Stiernhook, l. i. c. 2.

(i) 2 Arch. Pr. 51.

(f) 4 Inst. 266.

[the sheriff, for the sake of despatch, to do the same justice in his county court, as might otherwise be had at Westminster (*k*). The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer. The great conflux of freeholders, which are supposed always to attend at the county court, (which Spelman calls "*forum plebeie justitie et theatrum comitivie potestatis* (*l*)," is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must ever be made *in pleno comitatu*, or in full county court. By the statute 2 Edw. VI. c. 25, no county court shall be adjourned longer than for one month, consisting of twenty-eight days. And this was also the antient usage, as appears from the laws of King Edward the elder (*m*): "*præpositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito: litesque singulas dirimito.*" In those times the county court was a court of great dignity and splendour, the bishop and the ealdorman (or earl), with the principal men of the shire, sitting therein to administer justice, both in lay and ecclesiastical causes (*n*). But its dignity was much impaired, when the bishop was prohibited and the earl neglected to attend it;] and at the present day, owing chiefly perhaps to the introduction of courts of request, the resort to it is not very frequent. [Proceedings are removable from hence into the king's superior courts, by writ of *pone* or *recordari* (*o*), in the same manner as from hundred courts and courts baron; and the same writ of false judgment may be had in nature of a writ of error.]

(*k*) Finch, 318; F. N. B. 152.

(*l*) Gloss. v. *Comitatus*.

(*m*) C. 11.

(*n*) LL. Eadgari, c. 5.

(*o*) F. N. B. 70; Finch, 445.

These several species of common law courts, though confined to particular districts, have nevertheless been considered in this place under the head of courts of general jurisdiction, because [dispersed universally throughout the realm,] and at the same time [communicating with, and, as it were, members of] the courts of general jurisdiction, properly so called, [which are calculated for the administration of redress not in any one lordship, hundred, or county only, but throughout the whole kingdom at large. Of which sort is,]

IV. The Court of *Exchequer*,—the origin of which is as follows :—[By the antient Saxon constitution there was only one superior court of justice in the kingdom ; and that court had cognizance both of civil and spiritual causes, viz. the *wittenagemote* or general council (*p*), which assembled annually or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel ; and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton (*q*), and other antient authors, *aula regia* or *aula regis*. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person ; such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms ; determining according to the law military and the law of nations. Besides these, there were the lord high steward and lord great chamberlain, the steward of the household, the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants

(*p*) See an account of it, Turner, Hist. Ang. Sax. vol. iii. p. 177, 6th ed.

(*q*) Lib. 3, tr. 1, c. 7.

[and letters as were to pass under that authority, and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these, in their several departments, transacted all secular business, both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ*, who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and, from the plenitude of his power, grew at length both obnoxious to the people and dangerous to the government which employed him (r).

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of Magna Charta, and enacts, that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.*" This certain place was established in Westminster Hall, the place where the *aula regis* originally sate, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judge became so too, and a chief, with other justices of the Common Pleas, was thereupon appointed, with jurisdiction to hear and determine all pleas

(r) Spelm. Gl. 331, 332, 333; Gilb. Hist. C. P. Introd. 17.

[of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise to the inns of court in its neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it (s). This precedent was soon after copied by King Philip the Fair, in France, who about the year 1302 fixed the Parliament of Paris to abide constantly in that metropolis, which before used to follow the person of the king wherever he went, and in which he himself used frequently to decide the causes that were there depending; but all were then referred to the sole cognizance of the parliament and its learned judges (t). And thus also, in 1495, the Emperor Maximilian I. fixed the imperial chamber (which before always travelled with the court and household) to be constantly held at Worms, from whence it was afterwards translated to Spire (u).

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to decline apace under the long and troublesome reign of King Henry the Third. And in farther pursuance of this example, the other several offices of the chief justiciar were, under Edward the First (who new modelled the whole frame of our judicial polity), subdivided and broken into distinct courts of judicature. A court of chivalry was erected, over which the constable and mareschal presided, as did the steward of the household over another, constituted to regulate the king's domestic servants. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons

(s) Vide sup. vol. i. p. 16.

(u) Ibid. xxix. 467.

(t) Mod. Un. Hist. xxiii. 396.

[reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the Court of Chancery issuing all original writs under the great seal to the other courts; the Exchequer managing the king's revenue; the Common Pleas being allowed to determine all causes between private subjects; and the Court of King's Bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes (*x*).]

The Court of Exchequer, then, (to which our attention is at present particularly directed,) was at first [intended principally to order the revenues of the crown, and to recover the king's debts and duties (*y*),] though it has since acquired, and originally by usurpation (*z*), the ad-

(*x*) The King's Bench had also assigned to it the superintendence of both the other courts, by way of appeal. And this superiority it continued to retain until a recent period; but by 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, the writ of error from the Common Pleas and the Exchequer into the King's Bench, was taken away and transferred to the Court of Exchequer Chamber hereafter mentioned.

(*y*) 4 Inst. 103—116; vide Gilbert's Exch.; Attorney General v. Sewell, 4 Mee. & W. 77.

(*z*) The nature of this usurpation was as follows:—By the original constitution of the court to which it was incident, as stated in the text, to call the king's farmers and debtors to account, such parties as these were privileged in their turn to sue and implead all manner of persons in the same court that they were themselves thus called into. For this purpose they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he

was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit*, by which he is the less able to pay the king his debt or rent. Afterwards, and by gradual connivance, this surmise of being debtor to the king was allowed to be inserted by persons who did not really stand in that capacity, and came to be considered as mere words of course, so as to open the court to all the nation equally. The same fiction was permitted on the equity side of the court, where any person might file a bill against another upon a bare suggestion that he was the king's accountant,—a suggestion which was never controverted. This usurpation has long since, as well as the analogous one in the Queen's Bench, to be hereafter noticed, ripened into an indefeasible and unquestionable title. And by 2 Will. 4, c. 39, the *quo minus* is abolished.

ditional character of an ordinary court of justice between subject and subject. [It is called the Exchequer (*Scaccarium*), from the chequed cloth, resembling a chess-board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters. It consists of two divisions, the *Receipt* of the Exchequer (*a*), which manages the royal revenue,] and which is not material to our present purpose, [and the *Court*, or *judicial* part of it.]

This court was, from the time of the separation of the Exchequer from the *aula regia* down to a very recent period, [subdivided into a court of equity and a court of common law.] But by statute 5 Vict. c. 5, reciting that the business of the latter branch, or *plea side*, of the court had greatly increased, and that the judges thereof might advantageously be relieved from the equity business, all the power and jurisdiction of the Exchequer, as a court of equity, or otherwise than as a court of law or court of revenue unconnected with equity, was transferred to the Court of Chancery (*b*). The Court of Exchequer is now therefore a court of revenue and a court of common law only. In the former capacity it ascertains and enforces, by proceedings appropriate to the case, the proprietary rights of the crown against the subjects of the realm; in the latter it administers redress between subject and subject, in all actions whatever, except in the few species of real actions which still survive the general demolition of that class. It is a court of record, and its judges are at present five in number, consisting of one chief and four

(a) Vide sup. vol. ii. p. 544.

(b) By a subsequent act, 5 & 6 Vict. c. 86, certain offices on the revenue side are abolished, and their duties transferred to *her Majesty's remembrancer in the Exchequer*, whose office the lords commissioners of the Treasury are empowered to regulate.

The attorneys of the Queen's Bench, Common Pleas, and Exchequer of Pleas, are also by the same statute admissible to practise in the Exchequer on the revenue side; and all process from the revenue side may be tested and made returnable either in term or vacation.

puisé *barons*, as in this court the judges are termed (*c*). A writ of error lies from this court into the Court of Exchequer Chamber, to which we shall have occasion more particularly to advert in the course of the present chapter.

V. The Court of *Common Pleas*, or, as it is sometimes technically called, the Court of *Common Bench*, whose origin has been already explained, is also a court of record, and in that capacity takes cognizance of all actions between subject and subject, without exception, including formerly the extensive class of real actions,—of which it still retains the few surviving species. And over remedies of this kind (which formerly excelled all others in importance) it has always exercised an exclusive jurisdiction, as it did also over fines and recoveries, while these modes of assurance existed, and still does, over the forms of conveyance now substituted for them. For these reasons, and also because its authority in these matters was original and not usurped (as in the case of the Exchequer and Queen's Bench), it has always been considered as the principal seat of the learning relative to ordinary actions between man and man, and is styled by Lord Coke the lock and key of the common law (*d*). It has no authority, however, like the Exchequer, in matters relating to the revenue. The judges are at present five in number, one chief and four puisné justices; and from their decision a writ of error lies into the Exchequer Chamber.

(*c*) "These," says Blackstone, "Mr. Selden conjectures ('Tit. Hon. 2, 5, 16) to have been antiently made out of such as were barons of the kingdom or parliamentary barons, and thence to have derived their name; which conjecture receives great strength from Bracton's explanation of Magna Charta, c. 14,

"which directs that the earls and barons be amerced by their peers, that is, says he, by the barons of the Exchequer. Bract. l. 3, tr. 2, c. 1, s. 3." 3 Bla. Com. p. 45.

As to the regulations of the officers of this court on the plea side, see 2 & 3 Will. 4, c. 110.

(*d*) 4 Inst. 99.

[VI. The Court of Queen's Bench (*c*) (so called because the sovereign used formerly to sit there in person (*d*), the style of the court still being *coram ipso rege*)] is also a court of record, and the [supreme court of common law in the kingdom; consisting of a chief justice and four *puisé* justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. Yet, though the sovereign himself used to sit in this court, and still is supposed so to do; he did not, neither by law is he empowered (*e*) to, determine any cause or motion, but by the mouth of his judges, to whom he hath committed his whole judicial authority (*f*).

This court, which (as we have seen) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the sovereign's person wherever he goes; for which reason all process issuing out of this court in the sovereign's name is returnable "*ubicunque fuerimus in Anglia.*" It hath indeed, for some centuries past, usually sat at Westminster, being an antient palace of the crown; but might remove with the sovereign to York or Exeter, if he

(*c*) This court is called the King's Bench in the reign of a king; and during the protectorate of Cromwell it was styled the Upper Bench.

(*d*) 4 Inst. 73.

(*e*) Vide sup. vol. ii. p. 526. The king used to decide causes in person in the *Aula Regia*. "*In curia domini regis ipse in propria persona jura decernit.*" (Dial. de Scacch. l. i. a. 4.) After its dissolution, Edw. IV., in the second year of his reign, sat in the Court of King's Bench three days together, but probably not for the purpose of acting as a judge. (See Christian's Black. vol. iii. p. 41, (*n*), and Henry's Hist. of Great Britain, vol. v. p. 382.) And, in later times, James I. is said to have sat there in

person, but was informed by his judges that he could not deliver an opinion.

(*f*) 4 Inst. 71. Lord Coke says, that the words in *Magna Charta*, c. 29, "*nec super eum ibimus, nec super eum mittemus, nisi, &c.*," signify that we shall not sit in judgment ourselves, nor send our commissioners or judges to try him. 2 Inst. 46. But that this is an erroneous construction of these words, appears from a *Magna Charta* granted by King John in the sixteenth year of his reign, which is thus expressed: "*nec super eos per vim vel per arma ibimus nisi per legem regni nostri, vel per judicium parium suorum.*" See Int. to Bl. Mag. Ch. p. xiii. — Christian's Bl. vol. iii. p. 41, (*n*).

[thought proper to command it. And we find that, after Edward I. had conquered Scotland, it actually sat at Roxburgh (*g*). And this moveable quality, as well as its dignity and power, are fully expressed by Bracton, when he says that the justices of this court are “*capitales, generales, perpetui, et majores; a latere regis residentes; quia omnium aliorum corrigere tenentur injurias et errores*” (*h*). And it is moreover especially provided in the *Articuli super Cartas* (*i*) that the king’s chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws.

The jurisdiction of this court is very high and transcendant. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown side or crown office (*j*); the latter in the plea side of the court (*k*). The jurisdiction of the crown side it is not our present business to consider; that will be more properly discussed in the ensuing volume. But on the plea side, or civil branch,] it enjoys, though chiefly by usurpation, as in the case of the Exchequer, a general jurisdiction and cognizance over all actions between subject and subject, those of the real class only excepted (*l*).

(*g*) M. 20, 21 Edw. 1; Hale, Hist. C. L. 200.

(*h*) L. 3, c. 10.

(*i*) 28 Edw. 1, c. 5.

(*j*) Vide 6 & 7 Vict. c. 20, for abolishing offices on the crown side of the Queen’s Bench, and regulating the crown office.

(*k*) Vide 6 Geo. 4, c. 82, to abolish the sale of offices in the Court of King’s Bench, &c.

(*l*) The usurpation of the Queen’s Bench originated as follows:—The jurisdiction of this court in civil actions was formerly confined to actions of trespass, or other injury alleged to be committed *vi et armis*. But this court might always have held plea of any civil action other than actions real, provided the defendant was an officer of the court, or in the custody of the marshal, that is, prison keeper of the

It does not meddle however with matters of revenue. A writ of error lies from this court to the Exchequer Chamber (*m*).

The three courts last enumerated, when mentioned collectively, are usually described as *the superior courts of the common law* (*n*); or when taken in connection with the Court of Chancery, to be presently mentioned, as *the superior courts* generally, or *the courts at Westminster*, where they are all in fact holden. And by this appellation they are usually distinguished from the courts of special jurisdiction, of which we are to speak hereafter, and also from the court baron, hundred court, and county court, of which we spoke at the beginning of this chapter, all of which are described as *inferior* courts, though discriminated from each other, as being either of record, or not of record (*o*). The judges of these superior courts of

court. On this latter privilege was built the fiction of surmising that the defendant had committed a breach of the peace in the county in which the court sits, and in which it was held to possess an extraordinary criminal jurisdiction, and then issuing a writ (called a bill of Middlesex) against him as for this trespass, and supposing him to be afterwards committed by virtue of that writ, and as for that trespass, to the custody of the marshal, so as to bring him within the proper jurisdiction of the court. 3 Bl. Com. 43, 285. Where the proceeding was against a prisoner (whether by aid of this fiction or otherwise), or against an officer of the court, the action was said to be commenced *by bill*. But in other cases the commencement was by an *original writ*; that is, a writ out of the Court of Chancery, under the great seal. Both of these modes of proceeding are now abolished by the effect of 2 Will. 4, c. 39, and a new method substituted.

(*m*) This is the case not only in actions first commenced in the Queen's

Bench, but also upon judgments in the Queen's Bench upon error from a county palatine. *Nesbit v. Rishton*, 9 A. & E. 426. It is the case, also, where error is brought upon an indictment. *R. v. Wright*, 1 A. & E. 434.

(*n*) The legislature has adopted this appellation. See 11 Geo. 4 & 1 Will. 4, c. 58; 3 & 4 Will. 4, c. 42; 1 & 2 Vict. c. 100, &c. The term of a *superior court*, however, in its strict and technical application, has a wider meaning, and embraces the courts of the counties palatine. *Peacock v. Bell*, 1 Saund. 73.

(*o*) From the inferior courts of record, and from the courts of the counties palatine, a writ of error lies in general into the Queen's Bench. 3 Bl. Com. 411; 1 Rol. Ab. 745. *Sem- ble*, into the Common Pleas also. *Carter*, 222. As to the removal into the superior courts of the judgments of inferior courts of record, in order to obtain more effectual execution, see 19 Geo. 3, c. 70, s. 4; 1 & 2 Vict. c. 110, s. 22. As to bailiffs of inferior

the common law are also often popularly called, by way of pre-eminence, the *judges of the land*, or simply the *judges* (*p*); and, though inferior in rank to the judge of the Court of Chancery (or lord chancellor), are of high dignity and precedence, taking rank before baronets (*q*), and being the constitutional advisers of the House of Peers on matters of law (*r*). They are at present, as we have seen, fifteen in number, that is, five for each court; but the number has varied considerably at different periods of our legal history (*s*). In modern times, indeed, it remained fixed for a long period at twelve; but in consequence of the increase of business, an additional judge was appointed about fourteen years ago (*t*) to each of the three courts (*u*). The salaries of chief justices of these courts respectively are fixed by 2 & 3 Will. IV. c. 116, at 10,000*l.*, 8,000*l.*, and 7,000*l.* respectively; of the puisné judges at 5,000*l.* per annum. They are all created by the queen's letters patent; and by 13 Will. III. c. 2, and 1 Geo. III. c. 23, they are not liable to removal except upon address of both houses of parliament (*x*).

courts generally, and execution under process thereof, 7 Vict. c. 19; 7 & 8 Vict. c. 96, s. 60, &c. As to appointing assessors for the same, s. 72.

(*p*) As to the *judges*, see also vol. ii. pp. 479, 492.

(*q*) Vide sup. p. 14.

(*r*) Vide sup. vol. ii. p. 373.

(*s*) Dugd. Orig. Jurid. c. 18.

(*t*) See stat. 11 Geo. 4 & 1 Will. 4, c. 70, ss. 1, 2.

(*u*) King James, during the greater part of his reign, appointed five judges in the Courts of Queen's Bench and Common Pleas for the benefit of a casting voice in case of a difference of opinion, and that the circuits might at all times be fully supplied with judges of the superior courts. And in subsequent reigns, upon the permanent indisposition of a judge, a fifth hath been sometimes appointed. 3 Bl. Com. 40, n., cites Raym. 475.

(*x*) As to the judges and officers of the courts at Westminster, or the superior

courts of common law collectively, the following statutes may also be noticed :

3 Geo. 4, c. 69, to enable the judges of the several courts of record at Westminster to make regulations respecting the fees of the officers, clerks, and ministers of the said courts. (And see 7 Will. 4 & 1 Vict. c. 30, s. 6.)

11 Geo. 4 & 1 Will. 4, c. 58, for regulating the receipt and future appropriation of fees and emoluments receivable by officers of the superior courts of common law.

11 Geo. 4 & 1 Will. 4, c. 70, s. 1, enabling one judge to sit apart from the rest.

3 & 4 Will. 4, c. 42, s. 1, (continued by 1 & 2 Vict. c. 100,) giving power to the judges of the superior courts of common law at Westminster to alter the mode of pleading, &c.

7 Will. 4 & 1 Vict. c. 30, to abolish certain offices in the superior courts

[VII. The High Court of Chancery is the only remaining, and in matters of civil property by much the most important of any, of the king's superior and original courts of justice. It has its name of Chancery, *cancellaria*, from the judge who presides here, the lord chancellor, or *cancellarius*; who, Sir Edward Coke tells us, is so termed a *cancellando*, from cancelling the king's letters patent when granted contrary to law, which is the highest point of his jurisdiction (*y*). But the office and name of chancellor (however derived) was certainly known to the courts of the Roman emperors; where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince. From the Roman empire it passed to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner: and therefore, when seals came in use, he had always the custody of the king's great seal. So that the office of chancellor, or lord keeper, (whose authority, by statute 5 Eliz. c. 18, is declared to be exactly the same,) is with us at this day created by the mere deli-

of common law, and to make provision for a more effective and uniform establishment of officers in those courts.

1 & 2 Vict. c. 32, to enable her majesty's courts at Westminster to hold sittings in banc in time of vacation.

1 & 2 Vict. c. 45, (extending 11 Geo. 4 & 1 Will. 4, c. 70, s. 4,) empowering every judge of the superior

courts of common law to transact out of court such business relating to the proceedings in any of these courts as may by the practice be transacted by a single judge.

1 & 2 Vict. c. 110, s. 20, empowering the judges of the superior courts at Westminster to frame new writs under that act.

(*y*) 4 Inst. 88.

[very of the king's great seal into his custody (z) ; whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom ; and superior, in point of precedency, to every temporal lord (a). He is a privy councillor by his office (b) ; and, according to Lord Chancellor Ellesmere (c), prolocutor of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic, (for none else were then capable of an office so conversant in writings,) and presiding over the royal chapel (d), he became keeper of the king's conscience ; visitor, in right of the king, of all hospitals and colleges of the king's foundation ; and patron of all the king's livings] of the value of 20*l.* per annum or under (e). [in the king's books. He is the general guardian of all infants, idiots, and lunatics ; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the Court of Chancery ; wherein, as] formerly [in the Exchequer, there are two distinct tribunals ; the one ordinary, being a court of common law ; the other extraordinary, being a court of equity.

The ordinary legal court is much more antient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias* to repeal and cancel the king's letters patent, when made against law or upon untrue suggestions ; and to hold plea of petitions, *monstrans de droit*, traverses of offices, and the like, when the king hath been advised

(z) Lamb. *Archeion*, 65 ; 1 Roll. Abr. 385.

(a) Stat. 31 Hen. 8, c. 10.

(b) Selden, *Office of Lord Chan.* s. 8.

(c) *Of the Office of Lord Chancellor*, edit. 1651.

(d) Madox, *Hist. of Exchequer*, 42.

(e) This limit is stated by Blackstone as "under the value of twenty marks ;" and he cites 38 Edw. 3 ; 3

F. N. B. 35. But, according to Mr. Christian, since the new valuation of benefices in the time of Henry VIII., it has been considered as 20*l.* per annum or under, probably on the ground that the twenty marks temp. Edw. III. were equivalent to 20*l.* temp. Hen. VIII.—Christian's *Black.*, vol. iii. p. 476, n., cites Gibs. 764 ; 1 Burn's *Ecc. Law*, 129. And see Lord Chancellor's case, Hobart, 214.

[to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right (*e*). On proof of which, as the king can never be supposed intentionally to do any wrong, the law questions not but he will immediately redress the injury; and refers that conscientious task to the chancellor, the keeper of his conscience. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party (*f*). It might likewise hold plea (by *scire facias*) of partitions of lands in coparcenary (*g*), and of dower (*h*), where any ward of the crown was concerned in interest, so long as the military tenures subsisted: as it now may also do of the tithes of forest land, where granted by the king and claimed by a stranger against the grantee of the crown (*i*); and of executions on statutes, or recognizances in nature thereof by the statute 23 Hen. VIII. c. 6 (*k*). But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury; but must deliver the record *propria manu* into the Court of King's Bench, where it shall be tried by the country, and judgment shall be there given thereon (*l*). And when judgment is given in Chancery upon demurrer or the like, a writ of error, in nature of an appeal, lies out of this ordinary court into the Court of King's Bench (*m*): though so little is usually done on the common law side of the court, that] Blackstone states himself to [have met with no traces of any writ of error (*n*) being actually brought, since the fourteenth year of Queen Elizabeth, A. D. 1572.

(*e*) 4 Rep. 54.

(*f*) 4 Inst. 80.

(*g*) Co. Litt. 171; F. N. B. 62.

(*h*) Bro. Abr. tit. Dower, 66; Moor. 565.

(*i*) Bro. Abr. tit. Dismes, 10.

(*k*) 2 Roll. Ab. 469.

(*l*) Gervase Molineux v. Lacon, Cro. Jac. 12; Latch. 112.

(*m*) Year Book, 18 Edw. 3, 25;

17 Ass. 24; 29 Ass. 47; Dyer, 315; Bishop of Bristol v. Sir Stephen Procter, 1 Roll. Rep. 287; 4 Inst. 80.

(*n*) The opinion of Lord Keeper North, in 1682, (1 Vern. 131; 1 Equ. Cas. Abr. 129,) that no such writ of error lay, and that an injunction might be issued against it, seems not to have been well considered.

[In this ordinary, or legal, court is also kept the *officina justitiæ*; out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, idiotcy, lunacy, and the like, do issue, and for which it is always open to the subject, who may there at any time demand and have, *ex debito justitiæ*, any writ that his occasions may call for. These writs (relating to the business of the subject) and the returns to them were, according to the simplicity of antient times, originally kept in a hamper, *in hanaperio*; and the others (relating to such matters wherein the crown is immediately or mediately concerned) were preserved in a little sack or bag, *in parva бага*; and thence hath arisen the distinction of the *hanaper* office (*n*), and *petty bag* office, which both belong to the common law court in Chancery.

But the extraordinary court, or court of equity, is now become the court of the greatest judicial consequence. This distinction between law and equity, as administered in different courts, is not at present known, or seems to have ever been known, in any other country at any time (*o*): and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans (*p*); the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws (*q*); but the power of both centered in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases

(*n*) As to the *comptrollers of the hanaper*, see 5 & 6 Vict. c. 103, transferring their duties to other officers.

(*o*) The *council of conscience*, instituted by John III. King of Portugal, to review the sentences of all inferior courts, and moderate them by equity, (Mod. Un. His. xxii. 237,) seems rather to have been a court of appeal.

(*p*) Thus too the court of session in Scotland, and every jurisdiction in Europe of which we have any toler-

able account, found all their decisions as well upon principles of equity as those of positive law. (Lord Kayms, *Histor. Law Tracts*, i. 325, 330; *Princ. of Equit.* 44.)

(*q*) Thus Cicero: "*jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? Quæ quidem plerique jure prætorio liberantur, nonnulla legibus.*" —*Offic.* l. i. x.

[by the principles of equity. With us too, the *aula regia*, which was the supreme court of judicature, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton (*r*), as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (composed under the auspices and in the name of Edward I. and treating particularly of courts and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction of the Court of Chancery. It seems therefore probable, that when the courts of law, proceeding merely upon the ground of the king's original writs and confining themselves strictly to that bottom, gave a harsh or imperfect judgment, the application for redress used to be to the king in person assisted by his privy council; (from whence also arose the jurisdiction of the Court of Requests (*s*), which was virtually abolished by the statute 16 Car. I. c. 10,) and they were wont to refer the matter either to the chancellor and a select committee, or by degrees to the chancellor only, who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case. This was the custom not only among our Saxon ancestors, before the institution of the *aula regia* (*t*), but also after its dissolution, in

(*r*) L. ii. c. 7, fol. 23; also f. 3 a, s. 5; see Plowd. 467.

(*s*) The matters cognizable in this court, immediately before its dissolution, were "almost all suits, that by colour of equity, or supplication made to the prince, might be brought before him: but originally and properly all poor men's suits, which were made to his majesty by supplication; and upon

which they were entitled to have right without payment of any money for the same. (Smith's Commonwealth, b. 3, c. 7.)

(*t*) "*Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. Si jus nimis severum sit, alleviatio deinde quaeratur apud regem.*" LL. Edg. c. 2.

[the reign of King Edward I. (*u*); and perhaps during its continuance, in that of Henry II. (*x*).

In these early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to antient precedents, it is provided by statute Westm. 2, 13 Edward I. c. 24, that “whensoever from thenceforth in one case a writ shall be found in the chancery, and in a like case falling under the same right and requiring the like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one: and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law (*y*), lest it happen for the future, that the court of our lord the king be deficient in doing justice to the suitors.” And this accounts for the very great variety of writs of trespass on the case, to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason and equity of his very case (*z*). Which provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of a court of equity (*a*); except that of obtaining a discovery by the oath of the defendant.

(*u*) Lambard, *Archeion*, 71.

(*x*) Johannes Sarisburiensis (who died A. D. 1182, 26 Hen. 2,) speaking of the chancellor’s office in the verses prefixed to his *Polycraticon*, has these lines:

“*Hic est, qui leges regni cancellat
iniquas,
Et mandata pii principis aqua
facit.*”

(*y*) A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westm. 2.

(*z*) Lamb. *Archeion*, 61.

(*a*) This was the opinion of Fairfax, a very learned judge in the time of Edward the Fourth. “*Le subpana*” (says he) “*ne serroit my cy soventement use come il est ore, si nous*

[But when, about the end of the reign of King Edw. III. uses of land were introduced (*b*), and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits, and binding in conscience by the clergy, the separate jurisdiction of the chancery as a court of equity began to be established (*c*); and John Waltham, who was bishop of Salisbury and chancellor to King Richard II., by a strained interpretation of the above-mentioned statute of Westm. 2, devised the writ of *subpœnâ*, returnable to the Court of Chancery only, to make the feoffee to uses accountable to his *cestui que use*: which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which, therefore, the chancellor himself is, by statute 17 Rich. II. c. 6, directed to give damages to the party unjustly aggrieved. But as the clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro lacione fidei*, as a spiritual offence against conscience, in case of non-payment of debts or any breach of civil contracts (*d*); till checked by the Constitutions of Clarendon (*e*), which declared that, "*placita de debitis, quæ fide interposita debentur, vel absque interpositione fidei, sint in justitia regis*;" therefore probably the ecclesiastical chancellors, who then held the seal, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued (*f*)

"attendomus tiels actions sur les cases,
"et mainteinomus le jurisdiction de
"ceo court, et d'auter courts." (Year
B. 21 Edw. 4, 23.)

(*b*) Vide sup. vol. i. p. 330.

(*c*) Spelm. Gloss. 106; R. v.
Standish, 1 Lev. 242.

(*d*) Lord Lyttelt. Hen. 2, Book 3,
p. 361, note.

(*e*) 10 Hen. 2, c. 15; Speed.
468.

(*f*) In 4 Hen. 3, suits in court
christian, *pro lacione fidei* upon tem-

poral contracts, were adjudged to be
contrary to law. (Bro. Abr. tit. Pro-
hibition, 15.) But in the statute or
writ of *circumspecte agatis*, supposed
by some to have issued 13 Edw. 1,
but more probably (3 Pryn. Rec.
336) 9 Edw. 2, suits *pro lacione fidei*
were allowed to the ecclesiastical
courts; according to some antient co-
pies, (Berthelet, Stat. Antiq. Lond.
1531, 90 *b*; 3 Pryn. Rec. 336,) and
the common English translation of
that statute; though in Lyndewood's

[to grasp at the same authority as before, in suits *pro læsione fidei*, so late as the fifteenth century (*g*), till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls (*h*), that in the reigns of Henry IV. and V. the commons were repeatedly urgent to have the writ of *subpœna* entirely suppressed, as being a novelty devised by the subtilty of Chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry IV., being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute 4 Hen. IV. c. 23, whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once upon their whole application: and in Edward the Sixth's time, the process by bill and *subpœna* was become the daily practice of the court (*i*).

But this did not extend very far; for in the antient treatise, entitled *Diversité des Courtes* (*k*), supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman; no lawyer having sat in the Court of Chan-

copy, (Prov. l. 2, t. 2,) and in the Cotton MS. (Claud. D. 2), that clause is omitted.

(*g*) Year Book, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 4, 29; 20 Edw. 4, 10.

(*h*) Rot. Parl. 4 Hen. 4, no. 78 and 110; 3 Hen. 5, no. 46, cited in

Prynne's Abr. of Cotton's Records, 410, 422, 424, 548; 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

(*i*) Rot. Parl. 14 Edw. 4, No. 33, (not 14 Edw. 3, as cited 1 Roll. Abr. 370, &c.)

(*k*) Tit. Chancery, fol. 296; Ras-tell's edit. A. D. 1534.

[cery from the times of the Chief Justices Thorpe and Knyvet, successively chancellors to King Edward III. in 1372 and 1373 (*l*), to the promotion of Sir Thomas More by King Henry VIII. in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or courtiers (*m*), or churchmen (*n*), according as the convenience of the times and the disposition of the prince required, till Serjeant Puckering was made lord keeper in 1592: from which time to the present the Court of Chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then Dean of Westminster, but afterwards Bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor (*o*).

In the time of Lord Ellesmere (A. D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench; whether a court of equity could give relief after or against a judgment at the common law? This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors, the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning in a court of equity a judgment in the Court of King's Bench obtained by gross fraud and imposition (*p*). This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity (*q*), that his majesty gave judgment on their behalf: but, not contented with the irrefragable reasons and precedents produced by his counsel (for the chief justice was clearly in the wrong), he chose rather to decide the question by referring it to

(*l*) Spelm. Gloss. 111; Dugd. Chron. Ser. 50.

(*m*) Wriothesly, St. John, and Hatton.

(*n*) Goodrick, Gardiner, and Heath.

(*o*) Biogr. Brit. 4278.

(*p*) Bacon's Works, iv. 611, 612, 632.

(*q*) Whitelocke of Parl. ii. 390; 1 Chan. Rep. Append. 11.

[the plenitude of his royal prerogative (*r*). Sir Edward Coke submitted to the decision (*s*), and thereby made atonement for his error: but this struggle, together with the business of *commendams* (in which he acted a very noble part (*t*)), and his controlling the commissioners of sewers (*u*), were the open and avowed causes (*x*), first of his suspension, and soon after of his removal, from his office.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revolution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I., did little to improve upon his plan: and even after the Restoration the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the Earl of Shaftesbury, who (though a lawyer by education) had never practised at all. Sir He-

(*r*) "For that it appertaineth to our
"princely office only to judge over all
"judges, and to discern and determine
"such differences, as at any time
"may and shall arise between our
"several courts touching their juris-
"dictions, and the same to settle and
"determine, as we in our princely
"wisdom shall find to stand most with
"our honour, &c." (1 Chanc. Rep.
App. 26.)

(*s*) See the entry in the Council Book, 26th July, 1616 (Biogr. Brit. 1390).

(*t*) In a cause of the Bishop of Winchester, touching a *commendam*, King James, conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their com-

pliance would be contrary to their oaths and the law: but upon being brought before the king and council, they all retracted and promised obedience in every such case for the future; except Sir Edward Coke, who said, "that when the case happened he would do his duty." (Biogr. Brit. 1388.)

(*u*) Vide post, tit. Court of Commissioners of Sewers.

(*x*) See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15th Nov. 1616. (Moor's Reports, 828.) Though Sir Edward might probably have retained his seat, if, during his suspension, he would have complimented Lord Villiers (the new favourite) with the disposal of the most lucrative office in his court. (Biogr. Brit. 1391.)

[neage Finch, who succeeded in 1673, and became afterwards Earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations; which have also been extended and improved by many great men, who have since presided in Chancery(y). And from that time to this, the power and business of the court have increased to an amazing degree.]

The judicial duties of this court of equity have been long shared in some measure by an officer of high rank, called the Master of the Rolls, originally appointed only for the superintendence of the writs and records appertaining to its common law department(z), but accustomed also to sit on the equity side as a separate, though subordinate judge(a). [Concerning his authority to hear and determine

(y) In recent times various acts have been passed for the improvement of this court. See 2 Will. 4, c. 33, to effectuate the service of process from the Court of Chancery; 2 & 3 Will. 4, c. 111, for abolition of sinecure offices in Chancery; 3 & 4 Vict. c. 94, amended by 4 & 5 Vict. c. 52, and 5 Vict. c. 5, enabling the Lord Chancellor, with advice and consent of the Master of the Rolls and Vice-Chancellor, or one of them, to alter the pleading and practice.

(z) 4 Inst. 82.

(a) The Master of the Rolls is properly the chief of a body of officers called the *Masters in Chancery*, of whom there are eleven others, including the accountant general. See as to these officers, 4 Inst. 82. The offices of the eleven masters were newly regulated by 3 & 4 Will. 4, c. 94, which provides that they shall thereafter be appointed by letters-patent under the great seal.

[causes, and his general power in the Court of Chancery, there were formerly divers questions and disputes very warmly agitated; to quiet which it was declared by 3 Geo. II. c. 30 (*a*), that all orders and decrees by him made, except such as by the course of the court were appropriated to the Great Seal alone, shall be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor, and so as they shall not be enrolled till the same are signed by his lordship (*b*).] And by a late statute, 3 & 4 Will. IV. c. 94 (*c*), he is specially directed to hear motions, pleas, and demurrers, as well as causes generally. The vast increase of business, however, to which reference has been already made, and the progress of which has been particularly marked during the last half century, having at length become such as to render the antient force of the Court of Chancery wholly inadequate to the labours it had to perform, it was found necessary in the year 1813 to appoint (*d*) another assistant to the Lord Chancellor under the title of Vice-Chancellor of England; and upon the recent transfer to this court of the equity business of the Exchequer, two more Vice-Chancellors have now been added to its judicial list (*e*). Each of these sits (like the Master of the Rolls) separately from the Lord Chancellor, to whom an appeal lies from the decisions of each of his assistant judges.

From this court of equity in Chancery, that is, from the decrees or orders of the Lord Chancellor (whether on appeal from his assistant judges or not) an appeal lies to the House of Peers.

[IX. The next court that shall be mentioned is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This

(*a*) As to the salary of the Master of the Rolls, see 7 Will. 4 & 1 Vict. c. 46. And see 1 & 2 Vict. c. 94, vesting in the Master of the Rolls the custody of the public records.

(*b*) 3 Bl. C. 450.

(*c*) Sect. 24.

(*d*) By stat. 53 Geo. 3, c. 24.

(*e*) By stat. 5 Vict. c. 5, s. 19.

[is the Court of Exchequer Chamber;] which is subject to considerable variety in its form: for first it exists as a court of mere debate, [such causes from the other courts being sometimes adjourned into it as the judges, upon argument, find to be of great weight and difficulty, before any judgment is given upon them in the court below (*f*).] And it then [consists of all the judges of the three superior courts] of common law, [and now and then the lord chancellor also.] Considered as a court of error, in which light we are now principally concerned with it, it [was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common law side of the Court of Exchequer. And to that end it consisted of the lord chancellor and lord treasurer, taking unto them the justices of the King's Bench and Common Pleas. In imitation of which, a second Court of Exchequer Chamber was erected by statute 27 Eliz. c. 8, consisting of the justices of the Common Pleas and the barons of the Exchequer; before whom writs of error might be brought to reverse judgments in certain suits originally begun in the Court of King's Bench.] But both these constitutions are now abolished. For a royal commission having issued in 1828 to inquire into the pleadings and practice of the superior courts of the common law, it recommended among many other improvements a new arrangement of this court, which was afterwards carried into effect by 11 Geo. IV. & 1 Will. IV. c. 70, s. 8. According to this arrangement the judgments of each of the superior courts in all suits whatever are subject to revision by the judges of the other two, sitting collectively as a court of error for that purpose in the Exchequer Chamber. The composition of this court consequently admits of three different combinations, consisting of any two of the courts below, viz. those which were not parties to the judgment supposed to be erroneous.

(*f*) 4 Inst. 119; *Warraine v. Smith*, 2 Bulst. 146.

From each combination of this court (*h*) [a writ of error lies to,

X. The House of Peers; which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law, committed by the courts below. To this authority this august tribunal succeeded of course upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside; it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. They are therefore in all causes] of common law or equity commenced in any court of England (*i*) (subject only to some slight exceptions (*k*)) a tribunal of appeal, (that is, either originally or after the intervention of a previous appeal to another court, as the case may be,)

(*h*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 8.

(*i*) But there is no appeal to the Lords from the Ecclesiastical, Maritime, or Prize Courts in England, nor from Man, Jersey, Guernsey, Saik, or Alderney, or from the colonies; the appeal in these cases being to the Queen in council. And the appeal from a court martial is to the Queen in person. From the courts of Scotland and Ireland, however, the appeal is to the House of Lords. As to appeals from Scotland, see 6 Ann. c. 26, s. 12; 48 Geo. 3, c. 151; 53 Geo. 3, c. 64; 59 Geo. 3, c. 35; 4 Geo. 4, c. 85. As to those from Ireland, 23 Geo. 3, c.

28; 39 & 40 Geo. 3, c. 67, Art. 8.

(*k*) One exception is in the case of the Court of the Stannaries of Cornwall, where the appeal is to the Warden of the Stannaries, and from him to the Privy Council of the Prince of Wales, as Duke of Cornwall; and if there be no Prince of Wales, then to the Queen in Council. So the appeal from the decision of the Vice-Chancellor of Lancaster seems to be to the Chancellor of the Duchy Court at Westminster, and the appeal from the Lord Chancellor in idiocy or lunacy is to the Queen in Council; 2 Chit. Gen. Prac. 593.

and they are also in all such causes [the last resort, from whose judgment no farther appeal is permitted ; but every subordinate tribunal must conform to their determinations ; the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they will make themselves masters of those questions upon which they undertake to decide, and in all dubious cases refer themselves to the opinions of the judges, who are summoned by writ to advise them ; since upon their decision all property must finally depend.

Hither may also be referred the tribunal established by statute 14 Edw. III. c. 5, consisting (though now out of use) of one prelate, two earls, and two barons, who are to be chosen at every new parliament, to hear complaints of grievances and delays of justice in the king's courts, and (with the advice of the chancellor, treasurer, and justices of both benches) to give directions for remedying these inconveniences in the court below. This committee seems to have been established, lest there should be a defect of justice for want of a supreme court of appeal, during any long intermission or recess of parliament ; for the statute farther directs, that if the difficulty be so great that it may not well be determined without assent of parliament, it shall be brought by the said prelate, earls, and barons unto the *next* parliament, who shall finally determine the same.

XI. We have next to notice [an eleventh species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing ; namely, the courts of assise and *nisi prius*.

These are composed of two or more commissioners,] called judges of assise (or of assise and *nisi prius*), [who are twice in every year (*l*) sent by the queen's special com-

(*l*) Occasionally a third circuit is appointed in the course of the year, for the purpose of gaol delivery.

mission] on *circuits* [all round the kingdom, to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster Hall;] there being, however, as to London and Middlesex, this exception, that instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, before the chief or other judge of the superior courts, at what are called the London and Westminster *sittings* (*m*). [These judges of assise came into use in the room of the antient justices in eyre, *justiciarii in itinere*; who were regularly established, if not first appointed, by the Parliament of Northampton, A.D. 1176, 22 Hen. II.(*n*), with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof: and they afterwards made their circuit round the kingdom once in seven years for the purpose of trying causes (*o*). They were afterwards directed by *Magna Charta*, c. 12, to be sent into every county once a year, to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assises; the most difficult of which they are directed to adjourn into the Court of Common Pleas to be there determined. The itinerant justices were sometimes mere justices of assise, or of dower, or of gaol delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (*p*): but the present justices of assise and *nisi prius* are more immediately derived] from the stat. Westm. 2, 13 Edw. I. c. 30, and consist principally of the judges of the superior courts of common law, to whom the

(*m*) These sittings are regulated by the following statutes: 18 Eliz. c. 12; 12 Geo. 1, c. 31; 24 Geo. 2, c. 18; 1 Geo. 4, c. 55; 11 Geo. 4 & 1 Will. 4, c. 70, s. 7.

(*n*) Seld. Jan. 1. 2, s. 5; Spelm. Cod. 329.

(*o*) Co. Litt. 293.—"Anno 1261,

justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptistæ;—et totus comitatus eos admittere recusavit, quod septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt." (Annal. Eccl. Wigorn. in Whart. Angl. Sac. i. 495.)

(*p*) Bract. l. 3, tr. 1, c. 11.

duty is confided of thus superintending the trial of matters of fact at the courts of assises and *nisi prius*, as well as that of deciding matters of law, and transacting other judicial business at their sittings *in banc* (as it is called), that is, on the bench of their respective courts at Westminster. For by the above-mentioned statute of 13 Edw. I. c. 30, the judges of assise and *nisi prius* are to be [assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county :—by statute 27 Edw. I. c. 4, (explained by 12 Edw. II. c. 3,) assises and inquests are allowed to be taken before any one justice of the court in which the plea was brought ; associating to him one knight or other approved man of the county :—by statute 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court) or before the chief baron of the Exchequer, if he be a man of the law ; or otherwise before the justices of assise, so that one of such justices be a judge of the King's Bench or Common Pleas, or the king's serjeant sworn :]—and lastly, by 2 & 3 Vict. c. 22, all justices of assise may on their respective circuits try causes pending in the Court of Exchequer, without issuing (as it had till then been considered necessary to do) a separate commission from the Exchequer for that purpose. [They usually make their circuits in the respective vacations after Hilary and Trinity Terms ; assises being allowed to be taken in the holy time of Lent by consent of the bishops at the king's request, as expressed in statute Westm. 1, 3 Edw. I. c. 51 (q). And it was also usual, during the times of popery, for the prelates to grant annual licences to the justices of assise to administer oaths in holy times : for oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance (r). The prudent jealousy of our

(q) Vide post, p. 561.

(r) Instances hereof may be met with in the Appendix to Spelman's

Original of the Terms, and in Parker's Antiquities, 209.

[ancestors ordained (s), that no man of law should be judge of assise in his own country, wherein he was born, or doth inhabit; and a similar prohibition is found in the civil law (t), which has carried this principle so far, that it is equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or has any civil connexion (u).] But in modern times, this prohibition, always inconvenient, has been also deemed unnecessary, the apprehensions on which it is founded being sufficiently obviated by the high character and position of our judges. By statute 12 Geo. II. c. 27, and 49 Geo. III. c. 91, it is consequently abolished.

[The judges upon their circuits] (which are seven in number) [now sit by virtue of] four (x) [several authorities. 1. The commission of the *peace*. 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol delivery*.—The consideration of all which belongs properly to the subsequent book of these Commentaries. The other authority is, 4. That of *nisi prius*, which is a consequence of the] antient [commission of *assise* (y), being annexed to the office of justices of assise by the statute of Westm. 2, 13 Edw. I. c. 30, and it empowers them to try all questions of fact issuing out of the courts at Westminster that are then ripe for trial by jury. These, by the course of the courts, are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises; but with this proviso, *nisi prius*, unless before the day prefixed the judges of assise come into the county in question (z). This they are sure to do in the vacations preceding each

(s) Stat. 4 Edw. 3, c. 2; 8 Rich. 2, c. 2; 33 Hen. 8, c. 24.

(t) Ff. 1. 22, 23.

(u) C. 9, 29, 4.

(x) Blackstone enumerates five, (including the *commission of assise*,) but the recent abolition of assises, and

other real actions, have thrown that commission out of force.

(y) *Bullock v. Parsons*, Salk. 454.

(z) These words are now contained in the award of the *distringas*, to compel the attendance of the jurors.

[Easter and Michaelmas term, which saves much expense and trouble. These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edward I. and II. before mentioned; whereby certain persons (usually the clerk of assise and his subordinate officers), are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assises, &c., that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by the absence of any of them, there is also issued of course a writ of *si non omnes*; directing, that if all cannot be present, any two of them (a justice or serjeant being one) may proceed to execute the commission (a).]

These are the courts of general jurisdiction for the determination of ordinary causes and matters, whether arising at law or in equity; but there are other courts whose province, though more special and peculiar as regards the subject-matter of litigation, are yet of jurisdiction equally general in respect of place and person; and of these therefore it will be proper to take some notice before we conclude the chapter. The courts to which we refer are *the Judicial Committee of the Privy Council, the Court of Bankruptcy and the Insolvent Court*. Of all these we have already given some account in the course of the second volume (b): but with respect to the two former, some statutes have been passed since the publication of that volume introductory of additional provisions, to which it may be desirable here briefly to advert. As to the judi-

(a) By 1 Geo. 4, c. 55, s. 5, any judge or baron of the Exchequer may amend a record, and make an order in a cause on circuit, whether in a suit depending in his own court or not. By 3 Geo. 4, c. 10, the commission of the judges on circuit may be opened on the next day to the one appointed, or if that be a Sunday, &c.

then on the day following. By 3 & 4 Will. 4, c. 71, the places at which assizes may be held may be fixed by order in council. By 7 Will. 4 & 1 Vict. c. 24 (amending 7 Geo. 4, c. 63,) provisions are made as to building, &c. shire halls for holding the assizes.

(b) Vide sup. vol. ii. p. 482, 225.

cial committee, the statutes 6 & 7 Vict. c. 38, and 7 & 8 Vict. c. 69, have extended the jurisdiction of the Privy Council, and consequently of that committee, in appeals from the colonies—have made various regulations for the improvement of the course of proceeding in case of appeal, whether from the colonies, or from the ecclesiastical or admiralty courts; and have also enlarged the powers of the judicial committee with respect to the prolongation of patent rights, in cases where the expense of the invention has been greater than the term originally granted has been sufficient to reimburse. With regard to the Court of Bankruptcy various amendments have been made by 7 & 8 Vict. c. 96, in that branch of the business of the commissioners which relates to the power of granting protection and relief in cases of insolvency,—and by another act of 7 & 8 Vict. c. 70, the commissioners are also empowered in their several courts to entertain and give effect to trust deeds and other voluntary arrangements made in such manner, and according to such course of proceedings, as in the act set forth, between persons not subject to the bankrupt law and their creditors.

CHAPTER V.

OF COURTS ECCLESIASTICAL (a), MILITARY, AND
MARITIME.

[BESIDES the several courts which were treated of in the preceding chapter, and in which all injuries are redressed that fall under the cognizance of common law, or equity, there still remain some other courts of a jurisdiction equally general;] but which give redress for no injuries but those of an ecclesiastical, military, and maritime nature; [and therefore are properly distinguished by the title of Ecclesiastical Courts, Courts Military, and Courts Maritime.

1. Before we descend to consider particular ecclesiastical courts, it must be premised in general, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the county court was as much a spiritual as a temporal tribunal: the rights of the church were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or in his absence the sheriff of the county, used to sit together in the county court, and had there the cognizance of all causes as well ecclesiastical as civil: a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal (b).

(a) As to Ecclesiastical Courts, vide Bac. Ab. tit. Courts; R. v. Throgood, 12 Ad. & El. 183; R. v. Baines, ib. 210; 3 & 4 Vict. c. 93.

(b) "*Celeberrimo huic conventui episcopus et aldermannus intersunt; quorum alter jura divina, alter humana populum edoceto.*"—LL. Edgar. c. 5.

[This union of power was] in some respects, it may be presumed, [very advantageous to them both: the presence of the bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decree in such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censures.

But so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to ecclesiastical jurisdiction only; which jurisdiction was supposed to be lodged in the first place and immediately in the pope, by divine indefeasible right and investiture from Christ himself; and derived from the pope to all inferior tribunals. Hence the canon law lays it down as a rule, that "*sacerdotes a regibus honorandi sunt, non judicandi*" (e); and places an emphatical reliance on a fabulous tale which it tells of the Emperor Constantine; that when some petitions were brought to him, imploring the aid of his authority against certain of his bishops, accused of oppression and injustice, he caused (says the holy canon) the petitions to be burnt in their presence, dismissing them with this valediction: "*ite et inter vos causas vestras discutite, quia dignum non est ut nos judicemus Deos*" (f).

It was not, however, till after the Norman conquest, that this doctrine was received in England; when William I. (whose title was warmly espoused by the monasteries, which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy and planted in the best preferments of the English church) was at length prevailed upon to establish this fatal incroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry, or by those of a

(e) Decret. part 2, caus. 11, qu. 1, c. 41.

(f) Ibid.

[more refined policy, in order to discountenance the laws of King Edward, abounding with the spirit of Saxon liberty, is not altogether certain. But the latter, if not the cause, was undoubtedly the consequence, of this separation: for the Saxon laws were soon overborne by the Norman justiciaries, when the county court fell into disregard by the bishop's withdrawing his presence, in obedience to the charter of the Conqueror (*g*), which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishops only, whose decisions were directed to conform to the canon law (*h*).

King Henry the First, at his accession, among other restorations of the laws of King Edward the Confessor, revived this of the union of the civil and ecclesiastical courts (*i*); which was, according to Sir Edward Coke (*j*), only a restitution, after the great heat of the conquest was past, of the antient law of England. This, however, was ill-relished by the popish clergy, who, under the guidance of that arrogant prelate Archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates: and therefore in their synod at Westminster, 3 Hen. I.,

(*g*) Hale, Hist. C. L. 102; Selden in Eadm. p. 6, l. 24; 4 Inst. 259; Wilk. LL. Angl. Sax. 292.

(*h*) "*Nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundred placita teneant, nec causamquæ ad regimen animarum pertinet ad iudicium secularium hominum adducant: sed quicumque secundum episcopales leges, de quacunque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat; ibique de causa vel culpa sua respondeat; et non secundum hundred, sed secundum canones et episcopales leges, rectum Deo et episcopo faciat.*" Wilk. 292.

(*i*) "*Volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerint tempore regis Edwardi.*" (Cart. Hen. 1, in Spelm. Cod. Vet. Legum, 305.) And what is here obscurely hinted at is fully explained by his code of laws extant in the red book of the Exchequer, though in general but of doubtful authority. Cap. 8. "*Generalia comitatuum placita certis locis et vicibus teneantur. Intersint autem episcopi, comites, &c.; et agantur primo debita veræ christianitatis jura, secundo regis placita, postremo cause singulorum dignis satisfactionibus expleantur.*"

(*j*) 2 Inst. 70.

[they ordained that no bishop should attend the discussion of temporal causes (*k*); which soon dissolved this newly effected union. And when, upon the death of King Henry the First, the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction (*l*). And as it was about that time that the contest and emulation began between the laws of England and those of Rome (*m*), the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding; this widened the breach between them, and made a coalition afterwards impracticable, which probably would else have been effected at the general reformation of the church.

In briefly recounting the various species of ecclesiastical courts, or, as they are often styled, courts christian (*curiæ christianitatis*), we shall begin with the lowest, and so ascend gradually to the supreme court of appeal (*n*).

1. The *Archdeacon's Court* is the most inferior court in the whole ecclesiastical polity.] It is held before a judge appointed by himself and called his official. Its jurisdiction comprises the granting of probates and administrations, and ecclesiastical causes in general arising within the archdeaconry; and in ordinary cases the party may commence his suit either in this court or the bishop's, though in some archdeaconries the suit must be commenced in the former, to the exclusion of the latter (*o*). From the archdeacon's court an appeal lies, by 24 Hen. VIII. c. 12, to that of the bishop.

[2. The *Consistory Court* of every diocesan bishop is held in their several cathedrals, for the trial of all eccle-

(*k*) "*Ne episcopi sæcularium placitorum officium suscipiant.*" Spelm. Cod. 301.

(*l*) Spelm. Cod. 310.

(*m*) See vol. i. p. 11.

(*n*) For farther particulars, see Burn's Ecclesiastical Law; Wood's

Institute of the Common Law; Oughton's Ordo Judiciorum; and Report of the Commissioners on Ecclesiastical Courts, Feb. 1832.

(*o*) Woodward v. Fox, 2 Vent. 267; Godolph. 61.

[siastical causes arising within their respective dioceses (*p*),] and also for granting probates and administrations (*q*). [The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies, by virtue of the same statute, to the archbishop of each province respectively.]

3. The Court of *Arches* is a court of appeal belonging to the Archbishop of Canterbury, whereof the judge is called the *dean of the arches*, because he antiently held his court in the church of St. Mary-le-bow (*Sancta Maria de arcubus*), though all the principal spiritual courts are now holden at Doctors' Commons. His proper jurisdiction is only over the thirteen peculiar parishes belonging to the archbishop, in London; but the office of dean of the arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office (as doth also the official principal of the Archbishop of York), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province.] Many suits also are brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the canon law by the denomination of *letters of request* (*r*). And from the Court of Arches an appeal formerly lay to the pope; and afterwards, by statute 25 Hen. VIII. c. 19, to the Court of Delegates; but it now lies by 2 & 3 Will. IV. c. 92, to the Privy Council.

[4. The Court of *Peculiars* is a branch of and annexed to the Court of Arches. It has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions (*s*) are originally

(*p*) Vide sup. p. 66.

(*q*) Vide sup. vol. ii. pp. 230, 337.

(*r*) 2 Chit. Gen. Prac. 496; Bur-

goyne v. Free, 2 Add. 406.

(*s*) As to the {power of the archbishop or bishop with respect to ex-

[cognizable by this court,] from which an appeal lies to the Court of Arches (*t*).

[5. The *Prerogative* Court is established for the trial of all testamentary causes, where the deceased hath left *bona notabilia* within two different dioceses; in which case the probate of wills belongs, as we have formerly seen (*u*), to the archbishop of the province, by way of special prerogative (*x*). And all causes relating to the wills, administrations, or legacies of such persons are, originally, cognizable herein, before a judge appointed by the archbishop, called the judge of the Prerogative Court, from whom an appeal] until of late lay [by stat. 25 Hen. VIII. c. 19, to the king in Chancery, instead of the pope as formerly.] It now lies, by stat. 2 & 3 Will. IV. c. 92, to the Privy Council.

[We have here passed by such ecclesiastical courts as have only what is called a *voluntary*, and not a *contentious*, jurisdiction, which are merely concerned in doing or settling what no one opposes, and keeping an open office for that purpose (as granting dispensations, licences, faculties, and other remnants of the papal extortions), but do not concern themselves with administering redress to any injury; and shall proceed to—

6. The great court of appeal in all ecclesiastical causes,] viz. the Privy Council (*y*). This has been substituted in our own times for the former appeal court, viz. the Court of Delegates, [*judices delegati*, appointed by the king's commission under his great seal, and issuing out of Chancery, to represent his royal person,] and hear the appeal. This court was held by virtue of the statute 25 Hen. VIII. c. 19, authorizing appeals to be made from the arch-

empty and peculiar *benefices*, under the act relative to pluralities and residence, see the act, 1 & 2 Vict. c. 106, ss. 107, 108.

(*t*) *Parham v. Tempter*, 3 Phil. Ec. Rep. 223.

(*u*) Sup. vol. ii. p. 237.

(*x*) The Archbishop of York as well as the Archbishop of Canterbury has his Prerogative Court.

(*y*) Vide 2 & 3 Will. 4, c. 92; 3 & 4 Will. 4, c. 41, s. 3; 6 & 7 Vict. c. 38.

bishops' courts to the king in chancery, and was [frequently filled with lords spiritual and temporal, and always with judges of the courts at Westminster, and doctors of the civil law.] Prior to that statute the appeal was to the pope. Appeals to Rome, indeed, [were always looked upon by the English nation, even in the times of popery, with an evil eye, as being contrary to the liberty of the subject, the honour of the crown, and the independence of the whole realm, and were first introduced, in very turbulent times, in the sixteenth year of King Stephen (A. D. 1151), at the same period (Sir Henry Spelman observes) that the civil and canon laws were first imported into England (z). But in a few years after, to obviate this growing practice, the Constitutions made at Clarendon, 11 Hen. II. on account of the disturbances raised by Archbishop Becket and other zealots of the holy see, expressly declare (a), that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any farther without special licence from the crown. But the unhappy advantage that was given, in the reigns of King John and his son Henry the Third, to the encroaching power of the pope, who was ever vigilant to improve all opportunities of extending his jurisdiction hither, at length riveted the custom of appealing to Rome, in causes ecclesiastical, so strongly, that it never could be thoroughly broken off till the grand rupture happened in the reign of Henry the Eighth, when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the crown, to which it originally belonged; so that the statute 25 Hen. VIII. was but declaratory of the antient law of the realm (b).] But in case the king himself be party in any of these suits, the appeal did not then lie to him-

(z) Cod. Vet. Leg. 315.

(b) 4 Inst. 341.

(a) Chap. 8.

[II. Next, as to the courts military (*e*). The only court of this kind known to, and established by, the permanent laws of the land, is the court of *chivalry*, formerly held before the lord high constable and marshal of England jointly; but since the attainder of Stafford, Duke of Buckingham, under Henry VIII. and the consequent extinguishment of the office of lord high constable, it hath usually, with respect to civil matters, been held before the earl marshal only (*f*). This court, by statute 13 Rich. II. c. 2, hath cognizance of contracts and other matters touching deeds of arms and war, as well out of the realm as within it. And from its sentence an appeal lies immediately to the king in person (*g*). This court was in great reputation in the times of pure chivalry, and afterwards, during our connexions with the continent, by the territories which our princes held in France:] but has long since fallen [entirely out of use, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments; as it can neither fine nor imprison, not being a court of record (*h*).

III. The maritime courts (*i*), or such as have power and jurisdiction to determine all maritime injuries, arising upon the seas or in parts out of the reach of the common law, are only the Court of Admiralty, and its court of appeal;] though in her majesty's possessions beyond the seas there are also established courts, with jurisdiction over maritime causes, including those relating to prize, under the denomination of Courts of Vice-Admiralty (*k*).

(*e*) See Com. Dig. Courts (E); Bac. Ab. Courts, Court of Constable and Earl Marshal.

(*f*) Parker's case, 1 Lev. 230; Show. Parl. Cas. 60.

(*g*) 4 Inst. 125.

(*h*) Chambers v. Jennings, 7 Mod. 127.

(*i*) See Com. Dig. Admiralty Courts;

Bac. Ab. High Court of Admiralty; Re Blanshard, 2 B. & C. 244.

(*k*) By 2 Will. 4, c. 51, it is enacted, that in all cases where a ship comes within the local limits of a court of vice-admiralty, suits may be commenced therein for "seamen's wages, "piloteage, bottomry, damage to ships "by collision, breach of regulations

The Court of Admiralty is held before the judge of the admiralty (*l*); who has besides a special commission from the crown to adjudicate on *prize of war* (*m*), and power also to decide on questions of *booty of war* (i. e. prize on shore), when specially referred to him by her majesty (*n*). [According to Sir Henry Spelman (*o*) and Lambard (*p*),] this court [was first of all erected by King Edward III. Its proceedings are according to the method of the civil law, like those of the ecclesiastical courts; upon which account it is usually held at the same place with the superior ecclesiastical courts, at Doctors Commons, in London (*q*). It is no court of record, any more than the spiritual courts.]

From the sentence of the admiralty judge, the appeal used to lie in general to the court of delegates (*r*); and from the vice-admiralty courts might be brought either before the Court of Admiralty in England, or the queen in council (*s*). [But in case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty or vice-admiralty as lawful prize, the appeal lay to certain commissioners, consisting chiefly of the privy council, and called lords commissioners in prize cases. And this by virtue of divers treaties with foreign nations, by which particular courts are established in all the maritime countries of Europe, for the decision of this question,

“ of his majesty’s service at sea, salary, and droits of admiralty,” notwithstanding the cause of action may have arisen out of the local limits of such court.

(*l*) This judge sat properly as the deputy of the lord high admiral of England, while an officer of that description was in use.

(*m*) 2 Chit. Gen. Pr. 538 a; 1 Doug. 594; *Lindo v. Rodney*, 2 Doug. 613 (*n*.); *Mitchell v. Rodney* (in error), 2 Bro. P. C. 423; *Faith v. Pearson*, 6 Taunt. 439.

(*n*) 3 & 4 Vict. c. 65, s. 22.

(*o*) Gloss. 13.

(*p*) Archæon, 41.

(*q*) By 3 & 4 Vict. c. 65, various provisions are made to improve the practice and extend the jurisdiction of this court; and by c. 66, the respective salaries of the officers therein are regulated. As to the power of the Court of Chancery to restrain its proceedings, see *Glasscot v. Lang*, 8 Sim. 388.

(*r*) 3 Bl. Com. 69. See 2 & 3 Will. 4, c. 92, s. 1.

(*s*) 3 Bl. Com. 69.

[whether lawful prize or not ; for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country, to determine it.] By 2 & 3 Will. IV. c. 92, however, the appellate jurisdiction of the delegates was transferred to his majesty in council. And by 3 & 4 Will. IV. c. 41, s. 2, all appeals in prize suits, and all other proceedings in the courts of admiralty or vice-admiralty courts, or any other court abroad, which might then be made to the High Court of Admiralty in England, or to the lords commissioners in prize cases, was directed in future to be also made to his majesty in council, and not to the High Court of Admiralty in England, or such commissioners as aforesaid. And by the latter statute, and by 6 & 7 Vict. c. 38, the privy council shall refer all such appeals to the judicial committee. But it is provided, that nothing in the 3 & 4 Will. IV. c. 41, contained, shall impeach any treaty or engagement with a foreign power by which it shall be stipulated that the appeal in cases of prize shall belong to another jurisdiction, but that the judgments of any persons appointed by such treaty shall be of the same force as if the act had not been passed.

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.

[IN the two preceding chapters we have considered the several courts whose jurisdiction is general; and which are so contrived that some or other of them may administer redress to every possible injury that can arise in the kingdom at large. There yet remain certain others, whose jurisdiction is special, confined to particular spots,] or districts of the realm. These are,

[I. The court of *piedpoudre* (*a*), *curia pedis pulverizati*: so called from the dusty feet of the suitors; or, according to Sir E. Coke (*b*), because justice is there done as speedily as dust can fall from the foot. Upon the same principle that justice among the Jews was administered within the gate of the city (*c*), that the proceedings might be the more speedy as well as public. But the etymology given us by a learned modern writer (*d*) is much more ingenious and satisfactory; it being derived, according to him, from *pied puldreaux*, (a pedlar, in old French,) and therefore signifying the court of such petty chapmen as resort to fairs or markets (*e*). It is a court of record (*f*), incident to every fair and market,] though fallen into disuse, and [now in a manner forgotten;] of which [the steward of him, who owns or has the toll of the market, is the judge: and its jurisdiction extends to administer justice for all commercial injuries done in that very fair or market, and not in

(*a*) See Bac. Ab. Court of Pie- Stat. 337.
poudre; Com. Dig. Market, G. 1, 2.

(*b*) 4 Inst. 272.

(*c*) Ruth, c. 4.

(*d*) Barrington's Observat. on the

(*e*) As to fairs and markets, vide sup. vol. ii. pp. 15, 123, 535.

(*f*) As to courts of record, vide sup. p. 382.

[any preceding one. So that the injury must be done, complained of, heard and determined, within the compass of one and the same day, unless the fair continues longer. The court hath cognizance of all matters of contract that can possibly arise within the precinct of that fair or market; and the plaintiff must make oath that the cause of an action arose there (*g*). From this court a writ of error lies, in the nature of an appeal, to the courts at Westminster (*h*). The reason of its original institution seems to have been, to do justice expeditiously among the variety of persons that resort from distant places to a fair or market: since it is probable that no other inferior court might be able to serve its process, or execute its judgments on both, or perhaps either of the parties; and therefore, unless this court had been erected, the complainant must necessarily have resorted, even in the first instance, to some superior judicature.

II. The forest courts(*i*),] which, though fallen into absolute desuetude, may yet, as institutions of some curiosity, deserve notice. These were [instituted for the government of the king's forests in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or *venison*, to the *vert* or greensward, and to the *covert* in which such deer are lodged.] They consist of [the courts of *attachments*, of *regard*, of *sweinmote*, and of *justice seat*. The court of *attachments*, *woodmote*, or forty days' court, is to be held before the verderors of the forest once in every forty days (*k*); and is instituted to inquire into all offenders against vert and venison (*l*): who may be attached by their bodies, if taken with the mainour, (or *mainœuvre*, *a manu*) that is, in the very act of killing venison or stealing wood, or preparing so to do, or by

(*g*) Stat. 17 Edw. 4, c. 2.

(*h*) Howel v. Johns, Cro. Eliz. 773.

(*i*) As to forests, vide sup. vol. ii. pp. 17, 18; and see Com. Dig. Chase,

R, 1, 2; Bac. Ab. Courts, Courts of the Forest.

(*k*) Cart. de Forest. 9 Hen. 3, c. 8.

(*l*) 4 Inst. 289.

[fresh and immediate pursuit after the act is done(*m*); else they must be attached by their goods. And in this forty days' court the foresters or keepers are to bring in their attachments, or presentments *de viridi et venatione*; and the verderors are to receive the same, and to enrol them, and to certify them under their seals to the court of justice-seat or sweinmote(*n*); for this court can only inquire of, but not convict offenders. 2. The court of *regard*, or survey of dogs, is to be holden every third year for the lawing or expeditation of mastiffs, which is done by cutting off the claws and ball (or pelote) of the forefeet, to prevent them from running after deer(*o*). No other dogs but mastiffs are to be thus lawed or expeditated, for none other were permitted to be kept within the precincts of the forest; it being supposed that the keeping of these, and these only, was necessary for the defence of a man's house(*p*). 3. The court of *sweinmote* is to be holden before the verderors, as judges, by the steward of the sweinmote thrice in every year(*q*), the sweins or freeholders within the forest composing the jury. The principal jurisdiction of this court is, first, to inquire into the oppressions and grievances committed by the officers of the forest; "*de super-operatione forestariorum, et aliorum ministrorum forestæ; et de eorum oppressionibus populo regis illatis*:" and, secondly, to receive and try presentments certified from the court of attachments against offences in vert and venison(*r*). And this court may not only inquire, but convict also, which conviction shall be certified to the court of justice-seat under the seals of the jury; for this court cannot proceed to judgment(*s*). But the principal court is, 4. The court of *justice-seat*, which is held before the chief justice in eyre, or chief itinerant judge, *capitalis justitiarius in itinere*, or his deputy; to

(*m*) Lord Lovelace's case, Carth. 79.

(*q*) Cart. de Forest. c. 8.

(*n*) Cart. de Forest. c. 16.

(*r*) Stat. 34 Edw. 1, c. 1.

(*o*) Ibid. c. 6.

(*s*) 4 Inst. 289.

(*p*) 4 Inst. 308.

[hear and determine all trespasses within the forest, and all claims of franchises, liberties, and privileges, and all pleas and causes whatsoever therein arising (*t*). It may also proceed to try presentments in the inferior courts of the forests, and to give judgment upon conviction of the swainmote. And the chief justice may therefore, after presentment made or indictment found, but not before (*u*), issue his warrant to the officers of the forest to apprehend the offenders. It may be held every third year; and forty days' notice ought to be given of its sitting. This court may fine and imprison for offences within the forest (*x*), it being a court of record: and therefore a writ of error lies from hence to the Court of Queen's Bench, to rectify and redress any mal-administrations of justice (*y*); or the chief justice in eyre may adjourn any matter of law into the Court of Queen's Bench (*z*). These justices in eyre were instituted by King Henry II. A. D. 1184 (*a*): and their courts were formerly very regularly held; but the last court of justice-seat of any note was that holden in the reign of Charles I. before the Earl of Holland; the rigorous proceedings at which are reported by Sir William Jones. After the Restoration another was held *pro forma* only, before the Earl of Oxford (*b*); but since the era of the Revolution in 1688, the forest laws have fallen into total disuse.

III. A third species of restricted courts is that of commissioners of *sewers*. This is a temporary tribunal, erected by virtue of a commission under the great seal, which formerly used to be granted *pro re nata* at the pleasure of the crown (*c*), but now at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers, 23

(*t*) 4 Inst. 291.(*z*) Ibid. 295.(*u*) Stat. 1 Edw. 3, c. 8; 7 Rich.(*a*) Hoveden.

2, c. 4.

(*b*) North's Life of Lord Guildford, 45.(*x*) 4 Inst. 313.(*c*) F. N. B. 113.(*y*) Ibid. 297.

[Hen. VIII. c. 5 (*r*). Their jurisdiction is to overlook the repairs of] the banks and walls of the sea coast and navigable rivers; or with consent of a certain proportion of the owners and occupiers to make new ones; and to cleanse such rivers, and the streams communicating therewith (*s*); [and is confined to such county or particular district as the commission shall expressly name. The commissioners are a court of record, and may fine and imprison for contempts (*t*); and in the execution of their duty may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh (*u*), or otherwise at their own discretion. They may also assess such rates, or scots, upon the owners of lands within their district, as they shall judge necessary (*x*): and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may, by statute 23 Hen. VIII. c. 5, sell his freehold lands (and by the 7 Ann. c. 10, his copyhold also) in order to pay such scots or assessments.] By 4 & 5 Vict. c. 45, they are also empowered, for the purpose of defraying such expenses incident to the commission as in the act particularized, to tax in the gross in each parish (*y*) such lands as are within the jurisdiction, but so that such lands shall contribute thereto in proportion to the benefit re-

(*r*) This act was made perpetual by 3 & 4 Edw. 6, c. 8, and amended by 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22, and 4 & 5 Vict. c. 45. As to sewers generally, see Callis's Pleading on the Statute of Sewers.

(*s*) By 3 & 4 Will. 4, c. 22, s. 10, the nature of the banks, streams, &c. falling within the jurisdiction of the commissioners is defined. And see farther as to the extent of their power, sects. 19, 21.

(*t*) *Inhabitants of Oldbury v. Stafford*, 1 Sid. 145.

(*u*) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the Third; from which laws all commissioners of sewers in England may receive light and direction; 4 Inst. 276.

(*x*) As to rates, see new provisions 3 & 4 Will. 4, c. 22, s. 14, &c.

(*y*) *Vide Emerson v. Saltmarshe*, 7 Ad. & El. 266.

ceived as compared with the lands of the other parishes—which tax shall be denominated the General Sewers Tax, and be recoverable by distress and sale (z). [But their conduct is under the control of the Court of Queen's Bench, which will prevent or punish any illegal or tyrannical proceedings (a). And yet in the reign of King James I. (8th Nov. 1616,) the privy council took upon them to order, that no action or complaint should be prosecuted against the commissioners, unless before that board; and committed several to prison who had brought such actions at common law, till they should release the same: and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those legal proceedings (b). The pretence for which arbitrary measure was no other than the tyrant's plea (c) of the *necessity* of unlimited powers in works of evident utility to the public, "the supreme reason above all reasons, which is the salvation of the king's lands and people." But now it is clearly held, that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of her Majesty's Court of Queen's Bench (d).

IV. The court of *policies of assurance*, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12, which recites the immemorial usage of policies of assurance, "by means whereof it cometh to pass, upon the
 "loss or perishing of any ship, there followeth not the
 "undoing of any man, but the loss lighteth rather easily
 "upon many, than heavy upon few, and rather upon them
 "that adventure not, than upon those that do adventure:
 "whereby all merchants, especially those of the younger
 "sort, are allured to venture more willingly and more
 "freely, and that heretofore such assurers had used to

(z) See Report on Local Taxation, p. 11; and App. A. 379.

(a) *Hetley v. Sir J. Boyer*, Cro. Jac. 336.

(b) *Moor*, 825, 826.

(c) *Milt. Parad. Lost*, iv. 393.

(d) *Smith's case*, 1 Vent. 66; the case of *Cardiff Bridge*, Salk. 146.

[“ stand so justly and precisely upon their credits, as few
 “ or no controversies had arisen thereupon ; and if any
 “ had grown, the same had from time to time been ended
 “ and ordered by certain grave and discreet merchants
 “ appointed by the lord mayor of the city of London ; as
 “ men by reason of their experience fittest to understand
 “ and speedily decide those causes :” but that of late years
 divers persons had withdrawn themselves from that course
 of arbitration, and had driven the assured to bring separate
 actions at law against each assurer : it therefore enables
 the lord chancellor yearly to grant a standing commission
 to the judge of the admiralty, the recorder of London,
 two doctors of the civil law, two common lawyers, and
 eight merchants ; any three of which, one being a civilian
 or a barrister, are thereby, and by the statute 13 & 14
 Car. II. c. 23, empowered to determine in a summary way
 all causes concerning policies of assurance in London,
 with an appeal (by way of bill) to the Court of Chancery.
 But the jurisdiction being somewhat defective, as extend-
 ing only to London, and to no other assurances but those
 on merchandize (*e*), and to suits brought by the assured
 only, and not by the insurers (*f*),] such commissions have
 been long wholly disused ; and [insurance causes are now
 usually determined by the verdict of a jury of merchants,
 and the opinion of the judges in case of any legal doubts ;
 whereby the decision is more speedy, satisfactory, and
 final.]

[V. The court of the *marshalsea*, and the *palace court*
 at Westminster, though two distinct courts, are frequently
 confounded together. The former was originally holden
 before the steward and marshal of the king’s house, and
 was instituted to administer justice between the king’s
 domestic servants, that they might not be drawn into other
 courts, and thereby the king lose their service (*g*). It was

(*e*) Styl. 166.

(*g*) Cox v. Gray, Bulstr. 211.

(*f*) Delbye v. Proudfoot, 1 Show. 397.

[formerly held in, though not a part of, the *aula regis* (*h*); and, when that was subdivided, remained a distinct jurisdiction, holding plea of all trespasses committed within the verge of the court, where only one of the parties is in the king's domestic service, (in which case the inquest shall be taken by a jury of the country,) and of all debts, contracts and covenants, where both of the contracting parties belong to the royal household; and then the inquest shall be composed of men of the household only (*i*). By the statute of 13 Ric. II. st. 1, c. 3, (in affirmance of the common law (*h*),) the verge of the court in this respect extends for twelve miles round the king's place of residence (*l*). And, as this tribunal was never subject to the jurisdiction of the chief justiciary, no writ of error lay from it (though a court of record) to the King's Bench, but only to parliament (*m*), till the statutes of 5 Edw. III. c. 2, and 10 Edw. III. st. 2, c. 3, which allowed such writ of error before the king in his place. But this court being ambulatory, and obliged to follow the king in all his progresses, so that, by the removal of the household, actions were frequently discontinued (*n*), and doubts having arisen as to the extent of its jurisdiction (*o*), King Charles I. in the sixth year of his reign, by his letters-patent erected a new court of record, called the *curia palatii* or *palace court*, to be held before the steward of the household and knight marshal, and the steward of the court, or his deputy; with jurisdiction to hold plea of all manner of personal actions whatsoever which shall arise between any parties within twelve miles of his majesty's palace at Whitehall (*p*).] But

(*h*) Flet. l. 2, c. 2.

(*i*) Artic. sup. Cart. 28 Edw. 1, c. 3; stat. 5 Edw. 3, c. 2; 10 Edw. 3, st. 2, c. 2.

(*k*) 2 Inst. 548.

(*l*) By the antient Saxon constitution, the *pax regia*, or privilege of the king's palace, extended from his palace-gate to the distance of three miles, three furlongs, three acres, nine feet,

nine palms, and nine barley corns; as appears from a fragment of the *Testus Roffensis*, cited in Dr. Hickes's *Dissertat. Epistol.* 114.

(*m*) Cox v. Gray, 1 Bulstr. 211; 10 Rep. 69.

(*n*) F. N. B. 241; 2 Inst. 548.

(*o*) Cox v. Gray, ubi sup.

(*p*) Inman v. Batten, 1 Sid. 180; Salk. 439.

this precinct does not include the city of London. [The court is now held once a week, together with the antient court of marshalsea, in the borough of Southwark : and a writ of error lies from thence to the court of Queen's Bench. But if the] damages are laid as high as 20*l.*, the cause [is usually removed on its first commencement, together with the custody of the defendant, either into the Queen's Bench or Common Pleas, by a writ of *habeas corpus cum causâ* :] and that without giving any security for the costs to be incurred. The utility of this court is therefore in fact confined to causes where the demand is below 20*l.*

[VI. The court of the duchy chamber of Lancaster is another special jurisdiction, held before the chancellor of the duchy, or his deputy, concerning all matter of equity relating to lands holden of the king in right of the duchy of Lancaster (*q*): which is a thing very distinct from the county palatine, (which hath also its separate chancery, for sealing of writs, and the like (*r*),) and comprises much territory which lies at a vast distance from it; as particularly a very large district surrounded by the city of Westminster. The proceedings in this court are the same as on the equity side in the court of chancery (*s*); so that it seems not to be a court of record: and, indeed, it has been holden that the court of chancery has a concurrent jurisdiction with the duchy court, and may take cognizance of the same causes (*t*).

VII. Another species of private courts, which are of a limited local jurisdiction, and have at the same time an exclusive cognizance of pleas, in matters both of law and equity (*u*), are those which appertain to the counties pala-

(*q*) Owen *v.* Holt, Hob. 77; Fisher
v. Patten, 2 Lev. 24.

(*r*) S. C. 1 Vent. 157.

(*s*) 4 Inst. 206.

(*t*) 1 Chan. Rep. 55; Toth. 145;
Hard. 171.

(*u*) 4 Inst. 213, 218; Finch, R.
452.

[tine of Lancaster and Durham (x). In both these, the queen's ordinary writs, issuing under the great seal out of Chancery, do not run; that is, they are of no force. For, as originally all *jura regalia* were granted to the lords of these counties palatine, they had of course the sole administration of justice, by their own judges appointed by themselves, and not by the crown. It would therefore be incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors. But when the privileges of these counties palatine and franchises were abridged by statute 27 Hen. VIII. c. 24, it was also enacted, that all writs and process should be made in the king's name, but should be *teste'd* or witnessed in the name of the owner of the franchise. Wherefore all writs, whereon actions are founded, and which have current authority here, must be under the seal of the respective franchises;] both of which are now united to the crown (y). [And the judges of assise who sit therein, sit by virtue of a special commission from the owners of the several franchises, and under the seal thereof, and not by the usual commission under the great seal of England. Hither also may be referred the courts of the *cinque ports*, or five most important havens, as they formerly were esteemed in the kingdom; viz. Dover, Sandwich, Romney, Hastings, and Hythe; to which Winchelsea and Rye have been since added: which have also similar franchises in many respects (z) with the counties palatine, and particularly an exclusive jurisdiction, (before the mayor and jurats of the ports,) in which exclusive jurisdiction the queen's ordinary writ does not run. A writ of error lies from the mayor and jurats of each port to the

(x) Blackstone speaks also of the courts of the counties palatine of Chester, and of the royal franchise of Ely. But these franchises are now abolished, see vol. i. pp. 120, 123. The Court of Common Pleas at Lancaster is now regulated by 4 & 5 Will. 4, c. 62; that at Durham by 2 & 3 Vict. c. 16. As

to the authority of the Court of Exchequer under the first of these statutes, see *Potter v. Moss*, 5 Tyr. 513; *Byrne v. Fitzbush*, 8 Dowl. P. C. 278. As to the attorneys of those courts, see 6 & 7 Vict. c. 73, s. 3.

(y) Vide sup. vol. i. pp. 121, 122.

(z) *Hall v. Norwood*, 1 Sid. 166.

[lord warden of the *cinque ports*, in his court of *Shepway*; and from the court of *Shepway* to the Queen's Bench (*a*). So likewise a writ of error lies from all the other jurisdictions to the same supreme court of judicature (*b*), as an ensign of superiority reserved to the crown at the original creation of the franchises.]

[VIII. The stannary courts in Devonshire and Cornwall (*c*), for the administration of justice among the tinners therein, are also courts of record,] of the same limited and exclusive nature as those of the counties palatine. [They are held before the lord-warden and his substitutes, in virtue of a privilege granted to the workers in the tin mines there, to sue and be sued only in their own courts, that they may not be drawn from their business, which is highly profitable to the public, by attending their lawsuits in other courts (*d*). The privileges of the tinners are confirmed by a charter, 33 Edw. I. and fully expounded by a private statute (*e*), 50 Edw. III. which has since been explained by a public act, 16 Car I. c. 15. What relates to our present purpose is only this: that all tinners and labourers in and about the stannaries shall, during the time of their working therein *bonâ fide*, be privileged from suits of other courts, and be only impleaded in the stannary court in all matters] arising within the stannaries (*f*), [excepting pleas of land, life, and member. No writ of error lies from hence to any court in Westminster-hall, as was agreed by all the judges (*g*) in 4 Jac. I. But an appeal lies from the steward of the court to the under-warden, and from him to the lord-warden, and thence to the privy council of the Prince of

(*a*) Jenk. 71; Dyversyté des Courts, t. Bank le Roy; Tiug v. Meriwether, 1 Sid. 356.

(*b*) Bro. Abr. t. Error, 74, 101; Davis, 62; 4 Inst. 38, 214, 218.

(*c*) See 6 & 7 Will. 4, c. 106; 2 & 3 Vict c. 58; Harvey v. Gilbard, 1 W. W. & H. 552; Rowe v. Brenton, 8 B. & C. 737; Carew, Hist. of Corn-

wall; Sir G. Harrison's Report, 1835.

(*d*) 4 Inst. 232.

(*e*) See this at length in 4 Inst. 232.

(*f*) If a cause of action between tinner and tinner arise *out* of the stannaries, it may be brought elsewhere if the plaintiff will. 2 Inst. 231; Com. Dig. Courts, L. 1.

(*g*) 4 Inst. 231.

[Wales, as Duke of Cornwall (*h*), when he hath had livery or investiture of the same (*i*): and from thence the appeal lies to the king himself in the last resort (*k*).

IX. The several courts within the city of London (*l*) and other cities, boroughs, and corporations throughout the kingdom, held by prescription, charter, or act of parliament, are also of the same private and limited species (*m*).] Of these it may be said in general, [that they

(*h*) 4 Inst. 230.

(*i*) Langworthy v. Scott, 3 Bulst. 183.

(*k*) Doderidge's Hist. of Cornwall, 94. In a convocation or parliament of tanners, held at Truro, 15th August, 12 Car. 1, article 5, it is said, "We present and affirm, that by our ancient custom the spalliard working with pick and shovel, the water-man, the boll or barrow-man, the dresser, the blower, and all other tanners, labourers, and workmen that necessarily attend getting the tin, or the dressing, blowing, or whitening it, so long as they continue their working without fraud, are properly called *privileged tanners*, and are not to sue or be sued out of the *stannary courts*, saving in case of life, land, or limb. And we farther present and affirm, that all the said former *privileged tanners*, if they shall discontinue their working about tin and tin works, and also all the *officers* and ministers of both courts, the *affeerers*, the owners of tin works in wastral or several, the *adventurers* in tin works, the *buyers* of black or white tin, and generally all others that intermeddle with tin, are called *tanners at large*, and have also the liberty, privilege, and benefit to sue, and may be sued, in the *stannary courts*, for matters there determin-

"able, and may also sue and be sued at the common law, at the pleasure of the plaintiff." Laws of the Stannaries, p. 35. And N. B. by 6 & 7 Will. 4, c. 106, the law would seem to be the same now as to workers in lead, copper, &c.

(*l*) The chief of those in London are the *Court of Hustings*, which is the county court of London, but in which no actions can be brought that are merely personal; the *Lord Mayor's Court*, which has a jurisdiction in personal actions generally, and also in equity; the *Sheriffs' Court* (in two divisions), having cognizance of personal actions generally; and the *Court of Requests*, whose jurisdiction extends to 10*l*. Of the two former, the recorder is, in effect, the sole judge, and a writ of error lies therefrom to certain commissioners, usually five of the judges of the Superior Courts, from whose judgment a writ of error lies to the House of Lords. Pulling's Laws of London, 167.

(*m*) A detailed statement as to all the borough courts, county courts, courts of requests, and other local courts throughout the kingdom, showing the extent of their jurisdiction, the authority under which they are held, and their form of process, &c., as returned to the Commissioners of Common Law, will be found in the

[arose originally from the favour of the crown to those particular districts, wherein we find them erected, upon the same principle that hundred courts and the like were established for the convenience of the inhabitants, that they may prosecute their suits and receive justice at home : that, for the most part, the courts at Westminster-hall have a concurrent jurisdiction with these, or else a superintendency over them (*n*), and are bound by the statute 19 Geo. III. c. 70,] and 1 & 2 Vict. c. 110, s. 22, [to give assistance to such of them as are courts of record, by issuing writs of execution] on their judgments; [and that the proceedings in these special courts ought to be according to the course of the common law, unless otherwise ordered by parliament; for though the king may erect new courts, yet he cannot alter the established course of law.] It is also to be observed, that by the Municipal Act, 5 & 6 Will. IV. c. 76, the recorder is to be the judge in any court of record for civil actions in the boroughs to which the act extends, if such court be not regulated by the provisions of any local act, or if a barrister of five years' standing did not sit as a judge or assessor therein when the Municipal Act passed; and provisions are also contained to regulate the jurisdiction of such courts, and the qualification and summoning of jurors therein (*o*). By 6 & 7 Will. IV. c. 105, s. 9, the recorder may also appoint a deputy, and make rules for the practice of such court, to be approved by the judges of the superior courts (*p*). And by 2 & 3 Vict. c. 27, every such court shall be holden for the trial of issues, of fact and of law, four times at least in each year, and with no

Fourth Report of the Common Law Commissioners, Appendix, Part II. No. V. As to the Law relative to these courts, see Com. Dig. Courts (O), (P.)

(*n*) *Groenwelt v. Burwell*, Salk. 144; S. C. 263.

(*o*) Sect. 118, &c.; 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c.

78, ss. 32—36.

(*p*) Et vide 2 & 3 Vict. c. 27. The rules for the borough court of Wells have been printed, and those of all other borough courts are nearly the same, so that one uniform system of practice may be said to prevail.

greater interval than four calendar months. From the borough courts of record, a writ of error lies in general into the Court of Queen's Bench (*q*).

But besides the borough courts of record, which are generally according to the common law, [there is one species of courts, constituted by act of parliament, in the city of London and other towns, which] are not courts of record, and which [in their proceedings vary from the course of the common law, viz. the courts of requests or courts of conscience for the recovery of small debts. The first of these was established in London so early as the reign of Henry the Eighth, by an act of their common council, which, however, was certainly insufficient for that purpose, and illegal, till confirmed by statute 3 Jac. I. c. 15, which has since been explained and amended by] several statutes, the last of which was the 5 & 6 Will. IV. c. xciv. The ordinary constitution of these courts, which are generally for causes of debt to the amount of 40*s*. only, but often to the amount of 5*l*., is to examine in a summary way, and without jury, [by the oath of the parties or other witnesses, and make such order therein as is consonant to equity and good conscience (*r*).] Besides the several acts under which they are respectively constituted, they are subject to some legislative enactments of a general kind. By the 26 Geo. III. c. 38, provisions are made for ascertaining the qualifications of the commissioners (*s*) of these courts. And by 7 & 8 Vict. c. 96, a variety of regulations are laid down with regard to executions issued out of inferior courts (including the courts of requests) against the goods of the debtor (*t*), and for

(*q*) Vide sup. 405, note (*o*).

(*r*) This implies that the judgment is not necessarily governed by the rules of the common law. *Scott v. Bye*, 2 Bing. 348. No writ of false judgment lies therefrom. *Ibid*.

(*s*) See *R. v. Hall*, 1 B. & C. 123. As to the power of appointing assessors

for these and other inferior courts, see 7 & 8 Vict. c. 96, s. 72.

(*t*) By the effect of the same act, sect. 57, abolishing arrest for debts under 20*l*., courts of requests have no longer the power of awarding execution against the person.

affording relief in cases of neglect, extortion or other misconduct of their bailiffs and other officers. In addition to which we may remark that by 7 Will. IV. & 1 Vict. c. 78, s. 35, the crown may, on the joint petition of the council of any borough, and the quarter sessions of the adjoining county, extend the jurisdiction of any court of record for civil actions, or any court of requests or court of conscience within the borough, over any district adjacent to the borough, and within the jurisdiction of the quarter sessions; and that by 6 & 7 Will. IV. c. 105, s. 7, in every case in which a court of requests or of conscience was established in any borough, the boundary of which was enlarged by the Municipal Act, the jurisdiction of such court shall extend to such enlarged boundary. For the recovery of small debts, the experiment has also been tried in one instance of remodelling the antient institution of the county courts, upon a plan analogous to that of a court of requests. [For by statute 23 Geo. II. c. 33, it is enacted, 1, That a special county court shall be held at least once a month in every hundred of the county of Middlesex, by the county clerk. 2. That twelve freeholders of that hundred, qualified to serve on juries, and struck by the sheriff, shall be summoned to appear at such court] as suitors (the term technically applied to freeholders attending the county courts), [by rotation, so as none shall be summoned oftener than once a year. 3. That in all causes not exceeding the value of 40s., the county clerk and twelve suitors shall proceed in a summary way, examining the parties and witnesses on oath, without the formal process antiently used; and shall make such order therein as they shall judge agreeable to conscience. 4. That no complaints shall be removed out of this court by any process whatsoever, but the determination herein shall be final. 5. That if any action be brought in any of the superior courts against a person resident in Middlesex,] and liable to be summoned to the said county court, [for a debt or contract, upon the trial whereof the jury shall find less than 40s. damages, the plaintiff shall recover

[no costs, but shall pay the defendant costs(*q*),] unless the judge shall certify that the freehold or title to the land, or that an act of bankruptcy, principally came in question. [6. Lastly, a table of very moderate fees is prescribed and set down in the act, which are not to be exceeded upon any account whatsoever (*r*).

X. There is yet another species of private courts, which must not be passed over in silence: viz. the Chancellor's Courts in the two Universities of England(*s*). Which two learned bodies enjoy the sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person is one of the parties; except in such cases where the right of freehold is concerned,] provided the defendant is resident there (*t*), and provided (in the case of Cambridge) the cause of action arose within the town of Cambridge and its suburbs(*u*). [And these, by the university charter, they are at liberty to try and determine, either according to the common law of the land, or according to their own local customs, at their discretion; which has generally led them to carry on their process in a course much conformed to the civil law (*v*).]

[These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations. And privileges of this kind are of very high antiquity, being generally enjoyed by all foreign universities as well as our own, in consequence, it is apprehended, of a constitution

(*q*) The act gives double costs, but see 5 & 6 Vict. c. 97, s. 2.

(*r*) A full account of the practice of this court will be found in the Fifth Report of the Common Law Commissioners, Appendix B. No. 5.

(*s*) *Leasingby v. Smith*, 2 Wils. 406; *Cases temp. Hardw.* 240; *Williams v. Brickenden*, 11 East, 543;

Browne v. Renouard, 12 East, 12; *Thornton v. Ford*, 15 East, 634; *Perrin v. West*, 3 Ad. & E. 405; *R. v. Chancellor of Oxford*, 1 A. & E. N. S. 952; 1 Woodd. 136.

(*t*) *Thornton v. Ford*, 15 East, 634.

(*u*) *Browne v. Renouard*, *ubi sup.*

(*v*) See *Bac. Ab. Universities* (B.)

[of the Emperor Frederick, A.D. 1158 (x). But as to England in particular, the oldest charter that has been cited (y), containing this grant to the university of Oxford, was 28 Hen. III. A.D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King Henry VIII.; in the fourteenth year of whose reign the largest and most extensive charter of all was granted. One similar to which was afterwards granted to Cambridge in the third year of Queen Elizabeth. But yet, notwithstanding these charters, the privileges granted therein, of proceeding in a course different from the law of the land, were of so high a nature, that they were held to be invalid; for though the king might erect new courts, yet he could not alter the course of law by his letters patent. Therefore, in the reign of Queen Elizabeth, an act of parliament was obtained (z), confirming *all* the charters of the two universities, and those of 14 Hen. VIII. and 3 Eliz. by name. Which *blessed act*, as Sir Edward Coke entitles it (a), established this high privilege without any doubt or opposition (b): or, as Sir Matthew Hale (c) very fully expresses the sense of the common law and the operation of the act of parliament, “although King Henry VIII. 14 *anno regni sui*, “granted to the university a liberal charter, to proceed according to the use of the university, viz. by a course much “conformed to the civil law; yet that charter had not been “sufficient to have warranted such proceedings without “the help of an act of parliament. And therefore in 13 “Eliz. an act passed, whereby that charter was in effect “enacted; and it is thereby that at this day they have a “kind of civil law procedure, even in matters that are “of themselves of common law cognizance, where either “of the parties is privileged.”

(x) Cod. 4, tit. 13.

(y) Vide 3 Bl. Com. 84.

(z) 13 Eliz. c. 29.

(a) 4 Inst. 227.

(b) Jenk. Cent. 2, pl. 88; Cent. 3, pl. 33; Hard. 504; Godbolt, 201.

(c) Hist. C. L. 33.

[This privilege, so far as it relates to civil causes, is exercised at Oxford in the chancellor's court; the judge of which is the vice-chancellor, his deputy, or assessor. From his sentence an appeal lies to delegates appointed by the congregation; from thence to other delegates of the house of convocation; and if they all three concur in the same sentence, it is final, at least by the statutes of the university (*d*), according to the rule of the civil law (*e*). But if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates appointed by the crown under the great seal in chancery.]

We have now gone through the several species of special courts, of the greatest note in the kingdom, instituted for the local redress of private wrongs (*f*),] a subject which may be closed by [one general observation from Sir Edward Coke (*g*): that these particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever strictly restrained, and cannot be extended farther than the express letter of their privileges will most explicitly warrant.]

(*d*) Tit. 21, s. 19.

(*e*) Cod. 7, 70, 1.

(*f*) Another kind of court of special jurisdiction was that of the great sessions in Wales. For the king's original writ formerly did not run into Wales, as it still runs not into the counties palatine of Lancaster and Durham. And, like them, Wales had separate courts of its own. For by stat. 34 & 35 Hen. 8, c. 26, and 18 Eliz. c. 8, a session was appointed to be held twice a year in each county of Wales, by judges appointed by the crown, to be called the great session of the several counties in Wales. And though actions might nevertheless be

brought in the English courts on causes of actions arising in Wales, yet by the Welsh Judicature Act, 13 Geo. 3, c. 51, if the defendant in such actions also resided in Wales, and the plaintiff did not obtain a verdict for 10*l.*, he was in general liable to be nonsuited. But the court of great sessions is now abolished by 11 Geo. 4 & 1 Will. 4, c. 70, and the Welsh judicature entirely incorporated with that of England. This alteration was founded on the First Report of the Common Law Commissioners, appointed in 1828.

(*g*) 2 Inst. 548.

CHAPTER VII.

OF CIVIL INJURIES COGNIZABLE IN THE COMMON
LAW COURTS,—AND HEREIN OF THE REMEDY
BY ACTION GENERALLY.

WE are now to proceed, in pursuance of the method laid down in the third chapter, to the examination of civil injuries—for the redress of which the vast variety of courts mentioned in the preceding chapters have been established. And here, first, we may remark, that in one or other of these courts, every possible injury that can exist in contemplation of our laws is capable of being redressed, it being a settled and invariable principle in the laws of England, that every wrong must have a remedy (*a*).

The nature of civil injuries, and the law connected with them, will naturally range itself under a division having reference to the courts in which they are thus redressed. For they are distinguished from each other the most obviously, as cognizable either in the general courts of common law or equity, or in the general courts of ecclesiastical, military, or maritime law, or in the courts of special jurisdiction, though the same injury indeed may in some instances find redress in more than one description of court. But those cognizable in the courts last mentioned have necessarily been remarked upon as those tribunals were respectively enumerated, and therefore need not be here again repeated; which will confine our present inquiry to the civil injuries cognizable in the other courts. And we shall find it convenient to consider these

(*a*) 3 Bl. Com. 23. "It is a general and indisputable rule, that where there is a legal right, there is

"also a legal remedy by suit or action
"at law, whenever that right is invaded." Et vide *ibid.* 109.

in the following order:—First, the injuries cognizable in the common law courts; secondly, those cognizable in the ecclesiastical, military and maritime courts; and, lastly, those cognizable in the courts of equity; in the examination of each of which, we shall also take occasion to notice in general, the nature of the remedies by suit, which the law has provided for them. But in this course of disquisition [we shall at present confine ourselves to such wrongs as may be committed in the mutual intercourse between subject and subject, which the crown, as the fountain of justice, is officially bound to redress in the ordinary forms of law; reserving such injuries or encroachments as may occur between the crown and the subject to be distinctly considered hereafter, as the remedy in such cases is generally of a peculiar and eccentric nature.]

First, then, as to the several injuries between subject and subject, cognizable in the courts of common law.

[Since all wrong may be considered as merely a privation of right (*b*), the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived. This may either be effected by the specific delivery or restoration of the subject matter in dispute to the legal owner, as when lands or personal chattels are unjustly withheld or invaded,—or where that is not a possible, at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages, as in case of assault, breach of contract, &c.; to which damages the party injured has acquired an incomplete or inchoate right the instant he receives the injury (*c*), though such right be not fully ascertained till they are assessed by the intervention of the law,] that is, by the verdict of a jury. [The instruments whereby this remedy is obtained (which are sometimes considered in the light of the remedy itself),] are a diversity of *actions*, that is, suits at the common law,

(*b*) Vide vol. i. p. 126; et sup. p. 355. (*c*) Vide sup. vol. ii. p. 74.

[which are defined by the Mirror (*d*) to be “the lawful demand of one’s right,” or, as Bracton and Fleta express it, in the words of Justinian (*e*), *jus prosequendi in judicio quod alicui debetur*.

The Romans introduced pretty early set forms for actions and suits in their law, after the example of the Greeks; and made it a rule that each injury should be redressed by its proper remedy only. “*Actiones*,” say the *Pandects*, “*compositæ sunt, quibus inter se homines disceptarent; quas actiones, ne populus prout vellet institueret, certas solennesque esse voluerunt (f)*.” The forms of these actions were originally preserved in the books of the Pontifical College as choice and inestimable secrets, till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people (*g*). The concealment was ridiculous;] but the establishment of some *formula* was undoubtedly useful to define the cases in which the law considered a wrong to have been sustained, and to ascertain the nature of the remedy which it allowed, and thus to prevent the uncertainty that would otherwise have attended a subject of so much importance as the right of action (*h*). [Or, as Cicero expresses it (*i*), “*sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata lis accommodatur.*”] With us in England, accordingly, the several actions have been from time immemorial conceived in fixed forms of complaint, each exclusively appropriate to the particular kind of injury for which redress is demanded (*j*).

(*d*) Ch. 2, s. 1.

(*e*) Inst. 4, 6.

(*f*) Ff. 1, 2, 2, s. 6.

(*g*) Cic. pro Muræna, s. 11; De Orat. l. i. c. 41.

(*h*) Blackstone says, “the establishment of some standard was undoubtedly necessary to fix the true

“state of a question of right, lest in a
“long and arbitrary process it might
“be shifted continually, and be at
“length no longer discernible.” Vol. iii. p. 116.

(*i*) Pro Q. Roscio, s. 8.

(*j*) Vide Glanville, passim; Bract. lib. 5, De Exceptionibus, c. 17, s. 2.

Actions are subject, in the first place, to this principal division—that they are either *real*, *personal*, or *mixed* (*k*).

[Real actions, or (as they are called in the Mirror, *feudal* actions) which concern real property only,] are those whereby the plaintiff, here called the demandant, claims the specific recovery of any lands, tenements or hereditaments. [By these actions formerly all disputes concerning real estates were decided, but in modern times (*l*) they have been pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process, a much more expeditious method of trying titles being since introduced by other actions,] and particularly by the species called ejectment, of which we shall have occasion presently to speak; and subject to one or two exceptions, real actions are now at length, by the provisions of a recent act of parliament, abolished.

Personal actions are those whereby a man either claims the specific recovery of a debt (*m*), or personal chattel (*n*), or [satisfaction in damages (*o*) for some injury done to his person or property; being the same which the civil law calls “*actiones in personam, quæ adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere* (*p*).”

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained.] But they partake, in the main, of the character of real actions, and are often so called (*q*); and with the abolition of real actions these also, with very few exceptions, have been swept away.

The real and mixed actions which have escaped the

(*k*) Ch. 2, s. 6.

(*l*) Blackstone's expression is, that “they are now pretty generally laid aside, &c.” But this had been the case long before his time, see Co. Litt. by Harg. 239 a, note (1).

(*m*) As to *debts*, vide sup. vol. ii.

p. 186.

(*n*) As to personal chattels, vide sup. vol. ii. p. 65.

(*o*) As to damages, vide sup. 457.

(*p*) Inst. 4, 6, 15.

(*q*) Co. Litt. 285 b; Roscoe, Real Actions, I.

general demolition of their class, are the following: *writ of right of dower*, *dower*, *quare impedit*, and *ejectment* (*q*). The two first of these *lie* (in the language of the law), that is, are applicable, and are the proper forms to be used, where the demandant claims lands or tenements by the particular title of dower (*r*); the first being applicable where a woman is endowed of part of her dower, and is deprived of the residue, lying in the same town, by the same tenant by whom she was endowed of part (*s*); and the second, in all other cases where she is entitled to dower (*t*). *Quare impedit* lies where the object is to recover the presentation to a benefice, the right to present to which is disturbed; *ejectment*, where the object is to recover land improperly withheld, the case of land claimed in dower excepted. And as to the three first of these actions, it may be observed here, that by a peculiarity that has always attached to real and mixed actions, they can be brought in none of the superior courts of common law, except the Court of Common Pleas. But *ejectment* may be brought in any of them.

Personal actions are founded either on *contracts* or on *torts*, a term used to signify such wrongs as are in their nature distinguishable from breaches of contract;—and these torts are often considered as of three kinds, viz. *non-feazance*, or the omission of some act which a man is bound to do; *misfeazance*, being the improper performance of some act which he may lawfully do; or *malfeazance*, being the commission of some act which is unlawful (*u*). Actions founded on contract are sometimes described as actions *ex contractu*, and those on tort as actions *ex delicto*.

(*q*) Ejectment has been of late considered as a *mixed* action (see 3 Bl. Com. 214), and is expressly so denominated by the stat. 3 & 4 Will. 4, c. 27. Yet the correctness of that distribution may be doubted, as in its form it is clearly a species of the personal action of trespass. See Fitz. Ab. tit. Ejectione Firme, 2, cited 3

Bl. Com. 200. And accordingly it is capable of being brought in any of the superior courts of common law, which is contrary to the nature of a mixed action.

(*r*) Vide sup. vol. i. p. 249.

(*s*) Roscoe on Real Actions, 29.

(*t*) Ibid. 39.

(*u*) 1 Chit. Pl. 134, 1st edit.

The forms of personal action in use are the following: *debt, covenant, detinue, trespass, trespass on the case, and replevin*; the two first being founded generally on contract, the remainder on tort. Of these in their order.

Debt lies where the object is the recovery of a debt, that is, a certain sum of money alleged to be due to the plaintiff; covenant where redress in damages is sought for the breach of a covenant, that is, of an agreement by *deed* (v); detinue where the object is to recover a chattel personal unlawfully detained. Trespass lies where the plaintiff claims damages for a trespass, or (as it is more fully expressed) a trespass *vi et armis*, that is, an injury accompanied with actual force, as in the case of a battery or imprisonment—or at least implied force, as in the case of an unlawful but peaceable entry upon the plaintiff's land. And here it may be observed, that [trespasses savour of the criminal kind—being always attended with some violation of the peace,] real or supposed, [for which in strictness of law a fine ought to be paid to the crown, as well as a private satisfaction to the party injured (x).] Trespass on the case is a form of action less antient than the rest, having apparently first come into use in the reign of Edw. III. (y) It was invented under the authority of the Statute of Westminster, 13 Edw. I. c. 24 (z), upon the analogy of the old form of trespass, and supplied a great defect in the original scheme of personal actions—a scheme devised in comparatively barbarous times, and comprising no forms adapted to the redress of many of those injuries which in the progress of society gradually attract notice.

(v) As to deeds, vide sup. vol. i. p. 446.

(x) Finch, L. 198; Jenk.Cent. 185.

(y) Reeves's Hist. of Eng. L. vol. 3, p. 89; et vide ibid. pp. 243, 391.

(z) This statute provided, that
 "whenscever from thenceforth in one
 "case a writ shall be found in the
 "chancery, and in a like case, falling
 "under the same right, and requiring
 "like remedy, no precedent of a writ

"can be produced, the clerks in chan-
 "cery shall agree in forming a new
 "one; and if they cannot agree, it
 "shall be adjourned to the next par-
 "liament, where a writ shall be
 "framed by consent of the learned in
 "the law; lest it happen for the fa-
 "ture, that the court of our lord the
 "king be deficient in doing justice to
 "the suitors."

This kind of action (which derives its name from the comparative particularity with which the circumstances of the plaintiff's case are detailed in its written allegations (*a*)) is very comprehensive in its scope, and may be said to lie in every case where damages are claimed for an injury to person or property, not falling within the compass of the other forms. And as regards its relation to trespass we may notice this [settled distinction, that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*—but where there is no act done, but only a culpable omission, or where the act is not *immediately* injurious, but only by *consequence* or collaterally, there no action of trespass *vi et armis* will lie, but an action on the case for the damages consequent on such omission or act (*b*).] To which we may add that where the subject matter affected is not corporeal and tangible, so that the idea of force becomes inapplicable, there, though the injury be by way of act done, and its operation be direct and immediate, yet the remedy is case and not trespass (*c*). Lastly, with respect to replevin, it will be sufficient for the present to remark, that it is an action of very limited application, and lies only where the object is to try the legality of a distress levied upon the plaintiff's personal chattels (*d*).

A fitter opportunity will be found in the next chapter of entering more at large into the nature and the competency, in different cases, of the different actions above enumerated, and also of referring to the particular *species* which some of them comprise—but there are some points besides those hitherto mentioned, which, as relating to actions in general, seem to require notice in this place.

(*a*) 3 Bl. Com. 122.

(*b*) *Scott v. Shepherd*, 2 Bl. Rpe. 892.

(*c*) 1 Chitty, Pl. 143, cites Com. Dig. Action, Case, Disturbance, A. 2.

(*d*) It is said to lie in other cases also, see Co. Litt. 145 b; Vin. Ab.

Replevin (B.); Com. Dig. Action (M. 6); but any other application of it is wholly unknown in practice; and see *Galloway v. Bird*, 4 Bing. 300, that it does not lie to recover goods delivered to a carrier and retained by him.

Actions are either *local* or *transitory*; the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land; the latter on such causes of action as may be supposed to take place anywhere, as in the case of trespasses to goods, batteries, and the like. Real actions are always in their nature local, personal are for the most part transitory. Between local and transitory actions, there is this important distinction—that the former must be tried in the proper county where the cause of action arose, and by a jury of that county; the latter may be tried in any county at the discretion (in general) of the plaintiff. It follows from this, that when an injury is committed out of England, and its nature is such as to make the action local, no action at all will lie for its redress in any English court. On the other hand, where the nature of the injury is such that the action is transitory, such action will lie in the English courts, whether the injury was committed in England or elsewhere. In order to justify indeed the institution even of a transitory suit in the English courts when the cause of action arises abroad, it was formerly necessary to have recourse to a legal fiction, and to allege on the face of the proceedings, that the cause of action arose (contrary to the truth of the fact) in an English county. But by the effect of a recent improvement of the practice, any resort to this fiction is now rendered superfluous (*e*).

Personal actions are also subject (as sufficiently appears by preceding explanations) to the distinction of being either brought for the specific recovery of property, or for damages. As regards the competency of the latter kind of remedy, it is to be remarked, that an action for damages will in general lie wherever a right has been invaded—or, in other words, an injury committed, although no damage

(*e*) Reg. Gen. Hil. 4 Will. 4, r. 8. The plaintiff, however, in his declaration or statement setting forth his cause of action, is still required to

specify in the margin some English county, as that in which he purposes that the cause should be tried.

should have been actually sustained : it being material to the establishment and preservation of the right itself, that its invasion should not pass with impunity (*e*). Thus an action of trespass on the case by one commoner against another, for surcharging the common (that is, turning on more cattle than he was entitled to do,) may be maintained, although the plaintiff may not himself have turned on any cattle of his own during the same year, and can therefore have sustained no actual loss (*f*). In such cases, there being no ground for awarding damages to any considerable amount, the plaintiff recovers some trifling sum by way of *nominal* damages;—in addition to which, the defendant has in general to sustain the costs of the action, including those incurred by his adversary (*g*).

It is however requisite, in order to sustain an action for damages, that the plaintiff should have sustained some loss or inconvenience, whether actual or nominal, of a kind proper and peculiar to himself—for where the damage is of a merely public character, affecting the subjects of the realm at large as well as the plaintiff, no civil action lies, although the law considers the injury in that case as amounting to a crime, and consequently as a fit subject for an indictment. Thus no action can be maintained for an encroachment on the highway; but the offender is liable to be indicted as for a public misdemeanor. Wherever extraordinary damage, indeed, is sustained by an individual, he has in general a right of action as for redress of a civil injury, though the case may in its circumstances also amount to a crime. Thus, in the case last supposed, [if by means of a ditch dug across a public way, which is a common nuisance, a

(*e*) 1 Saund. by Wms. 346 b.

(*f*) Wells v. Watling, 2 Bl. Rep. 1233; et vide Marzetti v. Williams, 1 B. & Adol. 426; Blofeld v. Payne, 4 B. & Adol. 410.

(*g*) Where the action however is

really not brought to try a right, and the damages, as recovered by verdict, are under 40s. the plaintiff will in general not recover his costs; see 43 Eliz. c. 6; 21 Jac. 1, c. 16; 3 & 4 Vict. c. 24.

[man or his horse suffer any injury by falling therein, then, for this particular damage, which is not common to others, the party shall have his action (*h*).] And so in the case of unlawful violence done to the person, though that always amounts in contemplation of law to a crime, and, under particular circumstances, even to a felony, yet the party injured is entitled to his civil remedy. But even here this distinction is to be observed, that in the case of a felony the remedy for the private injury is *suspended* until the sufferer has fulfilled his duty to the public by prosecuting the offender for the public crime (*i*); though for a mere misdemeanor, such as assaults, batteries, libels, and the like, the right of action is subject to no such impediment.

Moreover, though an action will lie (as we have seen) for an injury, unattended with actual loss or damage, yet none can be maintained even for loss or damage actually inflicted, unless it result from an injury; it being a maxim, that a mere *damnum absque injuria* is not actionable. Thus, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him, for every one may lawfully erect a mill on his own ground. But if I have a mill by prescription (*k*) on my own land, and another erects a new mill, which draws away some portion of the stream from mine, so as to diminish its former power, an action will lie against him of trespass on the case (*l*).

It may also be remarked, that a plaintiff is not entitled to recover in respect of any damage that is too *remote*; or, in other words, flows not naturally and directly from the alleged injury (*m*). Thus, where the plaintiff, being director of certain musical performances, brought an action on the case against the defendant for publishing a libel on

(*h*) 3 Bl. Com. 220; *Wilks v. Hun-*
gerford Market, 2 Bing. N. C. 281.

(*i*) *Crosby v. Leng*, 12 East, 409;
7 & 8 Geo. 4, c. 29, s. 57.

(*k*) Vide sup. vol. ii. p. 13.

(*l*) Bac. Ab. Actions on the Case,
(C.), and the authorities there cited.

(*m*) Com. Dig. Action on Case,
Defamation.

a public singer engaged by the plaintiff, alleging that she was thereby deterred from performing in public, through the apprehension of being ill received, so that the plaintiff lost the profits which would otherwise have accrued to him as such director, it was held that the damage was too remote, and the action not maintainable (*n*).

As to suits of every class, it is generally true that the right of action is not assignable, so as to enable the assignee to sue in his own name. But in certain cases it is transferred by the operation of law. Thus the rights of action of a bankrupt or an insolvent pass (with certain exceptions) to their assignees; and upon the death of either of the parties between whom a cause of action has arisen, the right of maintaining such action survives in general to or against his executors or administrators. But in respect to suits which are founded on the violation of personal rights (*o*), as in the case, for example, of an action for slander, the maxim is, that they die with the person (*p*). And by the common law this extended to every case of *tort* (*q*). But it is now no longer the rule as regards torts committed in respect of *property*. For by 4 Edw. III. c. 7, trespass may now be maintained *by* executors or administrators for trespasses to the goods of the testator or intestate; and by 3 & 4 Will. IV. c. 42, s. 2, it is provided that trespass, or trespass on the case, (according to circumstances,) may be maintained *by* the executors or administrators, for any injury to the real estate of the deceased, committed in his lifetime, provided it were committed within six calendar months before his death, and the action brought within one year after his death. And farther, that the same forms of action may be maintained

(*n*) *Ashley v. Harrison*, 1 Esp. 48; et vide *Kelly v. Partington*, 5 B. & Adol. 645; *Knight v. Gibbs*, 1 Ad. & El. 43; *Green v. Button*, 1 Tyr. & G. 118; *Langridge v. Levy*, 2 Mee. & W. 519; *S. C. in error*, 4 Mee. & W. 337; 2 *Smith's Leading Cases*,

304.

(*o*) As to personal rights, vide sup. vol. i. p. 126.

(*p*) 3 Bl. Com. 302.

(*q*) 1 Chit. Pl. 56. As to *torts*, vide sup. p. 460.

against executors or administrators for any wrong committed by the deceased against another in respect of his property, real or personal, provided it have been committed within six calendar months before his death, and the action be brought within six calendar months after the executors or administrators have taken on themselves the administration.

CHAPTER VIII.

OF CIVIL INJURIES COGNIZABLE IN THE COMMON
LAW COURTS—*continued.*

HAVING in the course of the last chapter entered into some general explanations with regard to the nature of the great common law remedy, by *action*, (a subject to which we shall have occasion to revert,) we now resume our inquiry into the civil injuries cognizable in the courts of the common law,—to the right apprehension of which we have deemed some preliminary acquaintance with the scheme of actions essential.

The rights which are severally due to the different members of the community, and the establishment and maintenance of which we have considered as the great objects of municipal law, were divided (as we may remember) into personal rights, rights of property, rights in private relations, and public rights (*a*). It will be convenient, therefore, in proceeding to a farther investigation of the civil injuries cognizable in the courts of common law, to subject these injuries (which are but the violations of so many rights) to a similar distribution.

I. First, then, as to such injuries as affect *personal* rights, viz. the right of personal security, (comprising those of life, limbs, body, health and reputation,) and the right of personal liberty (*b*).

1st. Of injuries which affect the life of man, it is sufficient to remark, that they are not merely civil wrongs, but [one of the most atrocious species of crimes;] and con-

(*a*) Vide sup. vol. i. p. 128.

(*b*) Vide sup. vol. i. p. 129.

sequently [do not fall under our present contemplation, but must be reserved for the next Book of these Commentaries.

2, 3. The two next species of injuries affecting the limbs or bodies of individuals, shall be considered in one and the same view. And these may be committed, 1. By *threats* or menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury; but to complete the wrong, there must be both of them together (c).] [2. By *assault*, which is an attempt or offer to beat another without touching him: as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him, but misses him, this is an assault, *insultus*, which Finch (d) describes to be "an unlawful setting upon one's person."] [3. By *battery*, which is the beating of another. The least touching of another's person, wilfully or in anger, is a battery (e); for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it,—every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. And therefore upon a similar principle, the Cornelian law, *De injuriis*, prohibited *pulsation* as well as *verberation*,—distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none (f).] [4. By *wounding*, which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. By *mayhem*, which is an injury still more atrocious. It consists in violently depriving another of the use of a member proper for his defence in fight.

(c) The doctrine that trespass is the proper form of action for a *threat*, attended with injurious consequences, has been questioned. But see Finch, L. 202; 2 Rol. Ab. 545; Com. Dig. Battery (D.), in accordance with Blackstone on this subject.

(d) Finch, L. 202.

(e) Vide *Pursell v. Horn*, 3 Nev. & P. 564; *Stephens v. Myers*, 4 Car. & P. 349; *Forde v. Skinner*, *ibid.* 239; *James v. Campbell*, 5 Car. & P. 372; *Moriarty v. Brooks*, 6 Car. & P. 684; *Blake v. Barnard*, 9 Car. & P. 626.

(f) *Ff.* 47, 10, 5.

[This is a battery attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries as he might otherwise have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a foretooth (*f*), and also some others (*g*). But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting. For each of these five injuries, threats, assault, battery, wounding, and mayhem, an action of trespass will lie, wherein the jury will give adequate damages (*h*).] And for the four last, at least, [an indictment may be brought as well as an action.] It is to be observed, however, as to all these acts, that to render them either actionable or indictable, they must be committed on an unlawful occasion; for they are all in some cases justifiable, and form ~~no~~ just ground of complaint either civil or criminal. Thus assault and battery are justifiable [where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice (*i*). So also on the principle of self-defence; for if one strikes me first, or even only assaults me, I may strike in my own defence, and if sued for it, may plead *son assault demesne* (*j*), or that it was the plaintiff's own original assault that occasioned it;] and supposing a dangerous scuffle thereon to take place, I may even, for my own preservation, wound or maim my adversary, and justify it under a similar plea (*k*). [So likewise

(*f*) Finch, L. 204.

(*g*) 1 Hawk. P. C. 111.

(*h*) With respect to the action for mayhem, it is said to be attended with this peculiarity, that the court in which the action is brought has a discretionary power to increase the damages if they think the jury at the trial have not been sufficiently liberal to the plaintiff; but this must be done *super visum vulneris*, and upon proof

that it is the same wound concerning which evidence was given to the jury. Christian's Black. vol. iii. p. 121, (n.), cites *Brown v. Seymour*, 1 Wils. 5; 1 Barnes, 106.

(*i*) Hawk. P. C. b. 1, c. 61, s. 23; *Winstone v. Linn*, 1 B. & C. 469.

(*j*) *Oakes v. Wood*, 3 Mee. & W. 150.

(*k*) *Cockcroft v. Smith*, 2 Salk. 642.

[in defence of my goods or possessions, if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away (*l*). Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation (*m*); and if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose.] 6. The limbs and bodies of individuals may also be affected by indirect or consequential, as well as immediate injury,—particularly by *negligence* in the performance of duties: as in the case where a passenger in a coach is overturned by the carelessness of the driver (*n*). The remedy for this sort of injury is an action of trespass on the case, which may be brought not only where the coach proprietor is guilty of the negligence in his own person, but also where the fault was that of his servant; it being a general principle applicable not only to torts of this description, but to all other torts, and indeed to trespasses also, that a man is civilly liable not only for what he does in his own person, but what he does in the person of another, acting at the time by his authority. For *qui facit per alium, facit per se*. Another consequential injury to the bodies of individuals, falling under the same head, is that of damage done to the person, by a dog or other brute animal, used to do mischief; in which case [the owner must answer for the consequences, if he knows of such evil habit,] unless the dog were kept for the protection of the house and yard, and the attack was owing to the plaintiff's having improperly or incautiously entered the premises by night (*o*).

(*l*) Finch, L. 203.

(*m*) *Hawe v. Planter*, 1 Sid. 301; S. C. 1 Saund. 10.

(*n*) *Brotherton v. Wood*, 3 Brod. & Bing. 54; *Randleston v. Murray*, 8 Ad. & El. 109; *Lynch v. Nurdin*, 1

A. & E. N. S. 29.

(*o*) *Blyth v. Topham*, Cro. Jac. 158; *Brock v. Copeland*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 642; *Hartley v. Harriman*, 1 B. & Ald. 620; *Thomas v. Morgan*, 5 Tyr. 1085.

[4. Injuries affecting a man's *health* are, where by any unwholesome practices of another, a man sustains any damage in his vigour or constitution, as by selling him bad provisions or wine (*l*); by the exercise of a noisome trade, which infects the air in his neighbourhood (*m*);] or by the neglect or unskilful management of the surgeon, apothecary, or general practitioner who attends him (*n*). [For it hath been solemnly resolved (*o*), that *mala praxis* is a great misdemeanor and offence at common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus also, in the civil law (*p*), neglect or want of skill in physicians or surgeons "*culpæ adnumerantur; veluti si medicus curationem dereliquerit, male quempiam secuerit, aut perperam ei medicamentum dederit.*" These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages, by an action of trespass on the case;] and in case of gross misconduct, the party may in some cases also be indicted (*q*).

5. [Injuries affecting a man's reputation or good name] are, first, by malicious and defamatory words. And as to this injury (the remedy for which is also by trespass on the case), we may in the first place remark, that though malice is a necessary ingredient, yet where words are in a legal sense defamatory, and it does not appear that they were spoken on any such lawful occasion as to rebut the supposition of malice, the law will always conclude them to be malicious (*r*). The cases in which words will be considered defamatory, so as to amount to the legal in-

(*l*) 1 Rol. Abr. 90; R. v. Southerton, 6 East, 133.

(*m*) 9 Rep. 58; Hutt. 135; R. v. Dewsnap, 16 East, 194.

(*n*) Dr. Groenvelt's case, 1 Ld. Raym. 214; Seare v. Prentice, 8 East, 348; Slater v. Baker, 2 Wils. 359; Hancks v. Hooper, 7 Car. & P. 81;

Lauphier v. Phipos, 8 Car. & P. 475.

(*o*) Ld. Raym. ubi supra.

(*p*) Inst. 4, 3, 6, 7.

(*q*) R. v. Long, 4 Car. & P. 398; ibid. 407, n. (*a*).

(*r*) Bromage v. Prosser, 4 B. & C. 247; Hair v. Wilson, 9 B. & C. 643.

jury of which we now speak, are as follows: viz where a man utters any thing of another [which may either endanger him in law, by impeaching him of some] punishable (s) [crime,—as to say that he hath poisoned another, or is perjured (t); or which may exclude him from society,—as to charge him with having an infectious disorder,] tending so to exclude him (u); [or which may impair or hurt his trade or livelihood (v),—as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave;] or which may disparage him in an office of public trust,—as to say of a magistrate that he is partial and corrupt (w). But scandalous words [which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the ecclesiastical court (x)] And the case is the same as to words imputing unchastity to a woman, except that, by the custom of London, an action may be maintained for that species of slander in the city courts (y). [Words spoken in derogation of a peer or judge, or other great officer of the realm, which are called *scandalum magnatum*,] are held to be particularly heinous (z); [and though they may be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury, which is redressed by an action on the case, founded on many antient statutes (a), as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained.] But no resort to this action

(s) *Holt v. Scholefield*, 6 T. R. 691; *Heming v. Power*, 10 Mee. & W. 564.

(t) *Finch's Law*, 185.

(u) Such as leprosy, &c.; *Com. Dig. Act. Def. (D)*, 28.

(v) *Jones v. Littler*, 7 Mee. & W. 423.

(w) *Com. Dig. ubi sup.*; 2 Cro. 90; *Ashton v. Blagrove*, *Ld. Raym.* 1369.

(x) *Parret v. Carpenter*, *Noy*, 64.

(y) *Com. Dig. ubi sup. F.* 20; *Pulling's Laws of London*, 186, and see the authorities there cited. As to a similar custom in the city of Bristol, vide *Power v. Shaw*, 1 Wils. 62.

(z) *Earl of Peterborough v. Sir J. Mordant*, 1 Vent. 60.

(a) *Westm.* 1, 3 *Edw.* 1, c. 34; 2 *Rich.* 2, st. 2, c. 5; 12 *Rich.* 2, c. 11.

having been made in modern times, it is now in a manner forgotten. [It is said that formerly no actions were brought for words, unless the slander were such, as, if true, would endanger the life of the object of it(*b*). But too great encouragement being given by this lenity to false and malicious slanderers, it is now held, that for scandalous words of the several species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened, which is called laying his action with a *per quod*.] As if I say of a commission agent, that he is an unprincipled man, and borrows money without repaying it, this is not actionable unless there be special damage; but if I say this to a person who was going to deal with him, and he forbears to do so in consequence of its being said, an action will lie against me(*c*). So if I impute heresy or adultery to another, which are matters merely spiritual, yet if he can show that he was thereby exposed to temporal damage, he may sue me in a court of common law(*d*); and the case is the same if I impute unchastity to a woman, and she can show that she has thereby lost a marriage(*e*). And [in like manner to slander another man's title, by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard), is actionable,] provided it be not

(*b*) King v. Sir E. Lako, 2 Vent. 28.

(*c*) Storey v. Challands, 8 Car. & P. 234.

(*d*) 3 Bla. Com. 125; Carslake v.

Mapledoram, 2 T. R. 473; Bois v. Bois, 1 Lev. 134; Stephens v. Corben, 3 Lev. 595.

(*e*) Com. Dig. ubi sup. D. 30.

done in the *bonâ fide* assertion of the defendant's own title, and [provided any special damage accrues to the proprietor thereby, as if he loses an opportunity of selling the land (*f*).] It is, however, to be understood, that even where special damage has thus been sustained in consequence of words spoken with respect to person or property, yet if the words are not disparaging in themselves, it is *damnum absque injuriâ*, and no action can be maintained upon them (*g*). So even where the words are disparaging, and attended with special damage, or of such a kind as even without special damage will sustain an action, yet if they are [spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will,] they are not actionable, [for in such case they are not *maliciously* spoken,] which is part of the definition of the injury in question. And on the same principle are protected all such statements as it is usual to comprehend under the name of *privileged* communications (*h*), viz. those which are made on such lawful occasions as tend to rebut the *primâ facie* inference of malice which otherwise arises from a statement derogatory to private character; as where a man communicates to another circumstances which it is right that he should know in relation to a matter in which they have a mutual interest, but tending to the disparagement of a third person; or where a master, being called upon for the character of a servant who has left him, charges him with a theft. For in such cases as these no action lies, unless some proof of malice beyond the uttering of the words be offered, as that the defendant knew them to be false (*i*).

(*f*) As to slander of title, vide *Smith v. Spooner*, 3 Taunt. 246; *Robertson v. M'Dougall*, 4 Bing. 670; *Malachy v. Soper*, 3 Bing. N. C. 671.

(*g*) *Kelly v. Partington*, 5 B. & Ad 645.

(*h*) As to friendly or privileged communications, see *Wetherston v.*

Hawkins, 1 T. R. 110; *Rogers v. Clifton*, 3 Bos. & Pul. 594; *Knight v. Gibbs*, 1 A. & E. 43; *Martin v. Strong*, 5 A. & E. 535; *Padmore v. Lawrence*, 11 A. & E. 380; *Tuson v. Evans*, 12 A. & E. 733; *Wright v. Woodgate*, 1 Tyr. & G. 12.

(*i*) In *Lord Northampton's case*,

Also, if the defendant be able to prove the words to be *true*, no action will lie for any words of defamation whatever⁽ⁱ⁾, whether they were spoken on a privileged occasion or not, and whether special damage has ensued or not; for the law then deems them to be justifiable. [As if I can prove the tradesman a bankrupt, the physician a quack, and the lawyer a knave, this will destroy their respective actions,] a rule similar to that which prevailed in the civil law, and probably founded on the same policy: "*eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit (j).*"

A second way of affecting a man's reputation is by publishing a *libel* upon him, which, as regards the present purpose, may be defined to be some writing, picture, or the like, containing malicious and defamatory matter; and as regards the nature of this injury and the remedy, they are in general similar to what has been already laid down in the case of words spoken, but subject to some material differences. For not only such imputations as will support an action for words, but all contumelious matter that tends to degrade a man in the opinion of his neighbours or to make him ridiculous, will amount, when conveyed in writing, or by picture, or the like, to libel^(k). It seems also always necessary, when the libel is by way

12 Rep. 134, it is laid down that where the words spoken by the defendant are a mere repetition of what he has himself heard from another, and he names his author at the time, he is not liable to an action. See *vide* *M'Pherson v. Daniels*, 10 B. & C. 269; *De Crespigny v. Wellesley*, 5 Bing. 392.

(i) As to the manner of pleading the truth of the words, see *Hickinbotham v. Leach*, 10 Mee. & W. 361.

(j) *Ff.* 47, 10, 18.

(k) *Thorley v. Lord Kerry*, 4 Taunt. 355; *Cook v. Ward*, 6 Bing. 409;

Lord Churchill v. Hunt, 2 B. & Ald. 685; *Cheese v. Scales*, 10 Mee. & W. 488; *Hearne v. Stowell*, 12 A. & E. 719. The proper course at the trial of an action for libel is, for the judge to define to the jury what a libel is in point of law, and then to leave it to the jury to say whether the publication in question falls within that definition. *Parmiter v. Coupland*, 6 Mee. & W. 105. By Mr. Fox's Act, 32 Geo. 3, c. 60, the law is declared to be the same in criminal prosecutions for libel.

of picture, or similar representation, [to show by proper *innuendoes* and averments of the defendant's meaning, the import and application of the scandal,] in order to make it appear that such libel by picture was understood to be levelled at the plaintiff; but in the case of words, an innuendo, though often used, is in many cases superfluous. Again, it is to be observed, that while oral defamation is ground for an action only, there are in the case of publishing a libel, [two remedies—one by indictment and the other by action; the former for the *public* offence, (for every libel has a tendency to the breach of the peace by provoking the person libelled to break it,) and the latter to repair the *party* in damages, for the injury done by him.] And formerly the rule was, that on an indictment for publishing a libel the defendant was not allowed to allege the truth of it by way of justification (*l*). But in the action for damages the defendant might (in like manner as for words *spoken*) adopt that line of defence (*m*). And on this latter point the law is still the same; but on the former it is now materially altered by the late act 6 & 7 Vict. c. 96, for amending the law respecting defamatory words and libel. By this act it is provided, that in pleading to any indictment or information for a defamatory libel the defendant may, by way of defence, allege the truth of the matters charged; and farther, that it was for the public benefit that the matters charged should be published, showing the particular fact or facts by reason whereof it was for the public benefit; and that if after such plea the defendant shall be convicted, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the plea and the evidence thereon. The same act also contains provisions intended to relieve editors and proprietors of newspapers or other periodical publications from the hardship to which they were subject under the former law, in being held liable,

(*l*) 5 Rep. 125.

(*m*) *Lake v. Halton*, Hob. 253; 11 Mod. 99.

absolutely and without qualification, for all libels therein inserted, though inserted without their knowledge. These enactments are first, that in an action for a libel of this description it shall be competent to the defendant to plead that it was inserted without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the same publication a full apology, (or if the publication should be ordinarily published at intervals exceeding a week, had offered to publish the apology in any newspaper or periodical publication to be selected by the plaintiff,) and the defendant shall, upon such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained. And as regards an indictment or information for such a libel, that it shall be competent to defendant to prove that the publication was without his authority, consent or knowledge, and did not arise from want of due care and caution on his part. The statute farther enacts, that in all indictments or informations for libel, if judgment be given for the defendant, he shall be entitled to costs for the prosecution, and if it be given against him upon a special plea, he shall be liable to pay the prosecutor the costs occasioned by such plea; and moreover, that every person convicted of maliciously publishing a defamatory libel, knowing the same to be false, shall be liable to imprisonment for a term not exceeding two years in the common gaol or house of correction, and to pay such fine as the court shall award, and to the like punishments even where the aggravation of wilful falsehood does not exist, but with reduction of the limit of imprisonment, in that case, to one year. The act also contains a provision which applies to every action for defamation, whether oral or written, viz. that it shall be lawful for the defendant, (after notice in writing of his intention so to do, duly given to the plaintiff at the time of pleading,) to give in evidence in *mitigation of damages* that he made or offered an apology to the plaintiff before

the commencement of the action, or as soon afterwards as he had an opportunity, in case the action had been commenced before an opportunity could be found.

[A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him, which under the mask of justice and public spirit are sometimes made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by an action of conspiracy, which cannot be brought but against two at the least,] and is confined to the particular case where the plaintiff has been acquitted by verdict, upon an accusation of treason or felony (*m*), or (which is the only way now known in practice) by [an action on the case for a false and malicious prosecution,] which may be brought either against a single person, or against several, with an allegation that they conspired together for the purpose (*n*). And [an action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation and expense upon which this action is founded (*o*). However, any probable cause for preferring it is sufficient to justify the defendant.] Indeed, in order to maintain this action, the burthen lies on the plaintiff showing that no probable cause existed (*p*). And it is also essential for him to prove either that he was acquitted upon such prosecution, by verdict of a jury, or that it was in some other manner legally terminated in his favour(*q*). No action

(*m*) 1 Saund. by Wms. 229 a.

(*n*) Ibid.

(*o*) Jones v. Gwynn, 10 Mod. 219, 220; Chambers v. Robinson, Str. 691.

(*p*) As to the nature of this action, as founded on malice and the want of probable cause, and how far the question on probable cause is a question for the jury, vide Blackford v.

Dod, 2 B. & Adol. 179; Musgrove v. Newell, 1 Mee. & W. 582; Delisser v. Towne, 1 A. & E. N. S. 333; Panton v. Williams, 2 A. & E. N. S. 169; Mitchell v. Williams, 11 Mee. & W. 205.

(*q*) Morgan v. Hughes, 2 T. R. 225; Willes, 520, n.; Whitworth v. Hall, 2 B. & Adol. 695.

(it may be observed here) lies in a court of law for a malicious prosecution before a court martial (*r*); for “every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction (*s*).”

6. Injuries affecting the right of personal liberty are, in the first place, that of [false imprisonment (*t*), for which the law has not only decreed a punishment as a heinous public crime, but has also given a private reparation to the party, as well by removing the actual confinement for the present, as by subjecting the wrongdoer to a civil action on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets (*u*). Unlawful or false imprisonment consists in such confinement or detention without sufficient authority; which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit under his hand and seal, and expressing the cause of such commitment, or from some other special cause warranted for the necessity of the thing, such as the arresting of the felon by a private person without warrant, or the impressment of mariners for the public service. False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute, 29 Car. II. c. 7, s. 6, hath declared that such service of process,] except in cases of treason, felony,

(*r*) As to courts martial, vide sup. vol. ii. p. 600.

(*s*) *Johnstone v. Sutton* (in error), 1 T. R. 549.

(*t*) See as to this, *Smith v. Eggington*, 7 Ad. & El. 167; *Edgell v.*

Francis, 1 Man. & Gr. 222; *Glynn v. Houstoun*, 2 Man. & Gr. 337; *Jones v. Gurdon*, 2 Gale & D. 133; *Mitchell v. Forster*, 12 A. & E. 72.

(*u*) 2 Inst. 589.

or breach of the peace [shall be void. This is the injury. As for the remedy,] it is either for *removal* of the injury or for its *satisfaction* in damages.

The means of *removal* are principally by writ of *habeas corpus*. But this is a subject on which it would be premature at present to enter, as it will properly belong to a subsequent chapter, in which we shall have occasion to treat of such remedies in the common law courts as are distinct from the remedy by action (*a*). [The *satisfactory* remedy for this injury of false imprisonment is by an action of trespass &c., usually called an action of false imprisonment, which is generally and almost unavoidably accompanied with a charge of assault and battery also, and therein the party shall recover damages for the injury he has received."]

Besides the injury of false imprisonment, the right of personal liberty may, secondly, be invaded by an arrest under process, lawful in itself, executed at a lawful time, and in a lawful manner, but improperly set on foot by a party who had in fact no sufficient ground or even probable cause for taking that course; and this may be either in the way of a civil or criminal proceeding. In the former case the injury is generally described as a *malicious arrest* (*b*), in the latter as a *malicious prosecution*, of which enough has already been said in reference to the injury it inflicts on reputation. As to malicious arrest it is only another species of the same injury, and is redressed in the same form of action, viz. trespass on the case; and the law relating to it being in almost every other respect the same, does not require to be repeated. Indeed the occasions of malicious arrest have now become rare, in consequence of the late change of the law (*c*), by which arrests in civil suits before judgment obtained, are no longer allowable, except under

(*a*) Vide post, p. 693.

ubi sup.

(*b*) See as to this, *Saxon v. Castle*, 6 Ad. & El. 652; *Smith v. Eggington*,

(*c*) Vide statute 1 & 2 Vict. c. 110.

special circumstances, and under the authority of a judge's order.

II. We arrive next, according to the order proposed, at the consideration of such injuries as affect the right of *property* in things *real*, or (as they may be more compendiously described) the injuries to real property.

These [are principally six:—1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.]

1. *Ouster*, or dispossession, is a wrong or injury that may be sustained in respect of hereditaments corporeal or incorporeal (*c*), and [carries with it the amotion of possession; for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession and damages for the injury sustained (*d*). And such ouster or dispossession may either be of the *freehold* or of *chattels real*.]

Ouster of the *freehold* is effected by various methods: [1. By *abatement*; which is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold; this entry by him is called an abatement, and he himself is denominated an abator (*e*).]

(*c*) 3 Bl. Com. 170. The idea of ouster, however, is more directly applicable to a corporeal hereditament, or *land*. As regards those which are incorporeal, it is in general, as Blackstone remarks, "nothing more than a disturbance of the owner in the means of coming at or enjoying them;" and therefore it was always held that a disseisin of these amounted to an ouster only at the *election* of the party injured,—if, for the purpose of more easily trying the right in a real action, he was pleased to suppose himself disseised. 3 Bl. Com. 170.

(*d*) There may be ouster between tenants in common, coparceners and

joint tenants. Co. Litt. 199 b; 373 b; *Smales v. Dale*, Hob. 120.

(*e*) Finch, L. 195. Blackstone remarks here, that "this expression of *abating*, which is derived from the French, and signifies to quash, beat down, or destroy, is used by our law in three senses. The first, which seems to be the primitive sense, is that of abating or beating down a nuisance, (and in a like sense it is used in stat. Westm. 1, 3 Edw. 1, c. 17, where mention is made of abating a castle or fortress); the second is that of abating a writ or action, where it is taken figuratively, and signifies the overthrow or defeating of such writ

[2. By *intrusion* ; which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seised of certain lands and tenements, and a stranger entereth thereon after such death of the tenant, and before any entry of him in remainder or reversion (*f*) ;] such stranger being termed, in the technical sense of the word, an intruder. [3. By *disseisin* (*g*) ;] which is [a wrongful putting out of him that is seised of the freehold ;] not, as in the other cases, a wrongful entry where the possession was vacant, but [an attack upon him who is in actual possession, and turning him out of it ;] and as the two former kinds were [an ouster from a freehold in law,] so this is [an ouster from a freehold in deed.] All these three modes, it is to be observed, are [such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession, is unlawful ; but the two remaining are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards.] [4. By *forcement* ; this, in its most extensive sense, is *nomen generalissimum* ; a much larger and more comprehensive expression than any of the former ; it then signifying the holding of any lands or tenements to which another person hath a right (*h*) ; so that this includes as well an abatement, an intrusion, or a disseisin, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of

“ by some fatal exception to it ; the last
 “ is also a figurative expression, to
 “ denote that the rightful possession
 “ or freehold of the heir or devisee is
 “ overthrown by the rude intervention
 “ of a stranger.”

(*f*) Co. Litt. 277 ; F. N. B. 203, 204.

(*g*) As to disseisin, see Taylor v. Horde, 1 Ld. Ken. 143 ; Doe d. Maddock v. Lynes, 3 B. & C. 388 ; Doe v. Hall, 2 Dow. & Ry. 38 ; William v. Thomas, 12 East, 141.

(*h*) Co. Litt. 277. Et vide as to forcement, Co. Litt. by Butl. 331 b, n. (1).

[property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord has a seignior, and lands escheat to him *propter defectum sanguinis* (i), but the seisin of the lands is withheld from him: here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised; but being neither of these three, it is therefore a *deforcement* (k). If a man marries a woman, and during the coverture is seised of lands,] in fee simple, or fee tail, [and is disseised and dies, or dies in possession,] no act having been done in either of these cases to bar or defeat his widow's dower (l), [and the disseisor or heir enters on the tenements, and doth not assign the widow her dower, this is also a deforcement to the widow, by withholding lands to which she hath a right (m);] that is, by remaining in possession of the entire lands of the deceased, without setting forth for her any particular lands in satisfaction of her general claim to one-third. [In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestuy que vie*, and the lessee or any stranger who was, at the expiration of the term, in possession, holds over, and refuses to deliver the possession to him in remainder or reversion, this is likewise a deforcement (n).] Another species of deforcement is, [where two persons have the same title to land, and one of them enters and keeps possession against the other,—as where the ancestor dies seised of an estate in fee simple, which descends to two sisters or coparceners (o), and one of them

(i) Vide sup. vol. i. p. 402.

(k) F. N. B. 143.

(l) Vide sup. vol. i. p. 249.

(m) F. N. B. 8, 147.

(n) Finch, L. 263; F. N. B. 201, 205—7.

(o) Vide sup. vol. i. p. 319.

[enters before the other, and will not suffer her sister to enter and enjoy her moiety: this is also a forfeiturement (*p*).] In addition to all which modes of ouster, there was formerly another, viz., 5. By *discontinuance*, which was where a tenant in tail in possession made [a feoffment in fee simple, or for the life of the feoffee, or in tail, all which are beyond the power of a tenant in tail to make; for that by the common law extends no farther than to make a lease for his own life,] so as to be available against the issue or those in remainder or reversion (*q*). Such feoffment would formerly pass an estate in fee simple by *wrong*, and therefore on the death of the feoffor became an injury to the heir in tail, or those in remainder or reversion, as the case might be, which was termed a discontinuance (*r*). But now by 7 & 8 Vict. c. 76, no assurance shall create any estate by wrong, or have any other effect than the same would have if it were to take effect as a release, surrender, grant, lease, bargain and sale, or covenant to stand seised (as the case may be), so that the title by discontinuance seems to be abolished (*s*).

(*p*) Finch, L. 293, 294; F. N. B. 197; Co. Litt. 199 b.

(*q*) Blackstone lays it down absolutely, that his power extends no farther than to make a lease for his own life; and this is according to the text of Littleton. But the qualification above introduced is required to make that proposition an accurate one. See Co. Litt. by Butl. 331 a, n. (1).

(*r*) Co. Litt. 327 b.

(*s*) By the common law also alienation of a husband who was seised in the right of his wife worked a discontinuance of the wife's estate, till the contrary was provided by the statute 32 Hen. 8, c. 28; and formerly too if an alienation was made by a sole

corporation, or a bishop or dean without consent of the chapter, this was a discontinuance. But by 1 Eliz. c. 19, and 13 Eliz. c. 10, all such alienations were made absolutely void *ab initio* (see Gilb. Ten. p. 107). This important effect formerly belonged to a discontinuance, that it took away the entry of the heir in tail, remainderman, or reversioner, as the case might be, vide post, 488. But the law was altered in this respect by 3 & 4 Will. 4, c. 27, vide post, 491. As to an estate by *wrong*, vide sup. vol. i. p. 473. The law there stated is now altered by the above mentioned statute, 7 & 8 Vict. c. 76, which has been passed since the publication of that volume.

Secondly. Ouster of *chattels real* consists—1. Of [amotion of possession from estates held by statute, recognizance, or elegit (*t*),] which happens by [a species of disseisin, or turning out of the legal proprietor before his estate is determined, by raising the sum for which it is given him in pledge.] And 2. Of [amotion of possession from an estate of years (*u*),] which also takes place [by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land during the continuance of his term (*v*).]

[The several species and degrees of injury by ouster being thus ascertained, the next consideration is the remedy.]

But for the better illustration of this subject, on which great changes have been recently introduced, it will be necessary here to take some retrospect of the *former* state of the law with respect to the means of redress for a wrongful ouster.

According to that system the injury admitted of a variety of remedies, the competency of which depended on the lapse of time and other circumstances; and the distinctions which obtained on this subject may be compendiously stated as follows:

First. In the case of abatement, intrusion and disseisin, the party ousted might recover the possession by means of an action, that is, by one of the real (in which we always include, unless the contrary is indicated, mixed) actions: which were divided into two principal classes, viz. actions *possessory*, in which the object was to ascertain the right of possession; and actions *droitural*, brought to determine the right of property (*w*). But, as in the particular

(*t*) Vide sup. vol. i. p. 287, 288.

(*u*) Vide sup. vol. i. p. 263.

(*v*) It may be proper to remark, that the abolition of almost all the real actions has, to a considerable extent, abated the importance which

formerly belonged to the distinctions regarding the different kinds of ouster. The subject, therefore, has been treated rather more summarily than in Blackstone.

(*w*) 2 Bl. Com. 197; 3 Bl. Com.

cases of ouster just mentioned, the abator, intruder, and disseisor, had obviously a mere naked possession without colour of right, the law also gave the injured party the alternative in such cases of recovering possession at once, (where land was the subject of the ouster,) by the extra-judicial and summary method of *entry* mentioned in the first chapter of the present book. If he neglected, however, to avail himself of this for twenty years, (being under no disability in respect of infancy or the like,) his entry after that time was barred by the statute of limitations, 21 Jac. I. c. 16.

Next, if the abator, intruder, or disseisor died seised, and the land descended to his heir, or (in general) if the ouster took place by any of the species of deforcement, the heir or the deforciant (as the case might be) was considered as clothed with a species of presumptive title, called by Blackstone an *apparent right of possession* (x); for the heir in respect of his descent, and the deforciant in respect of the lawful inception of his title, had evidently a better or more colourable right than that gained by mere abatement, intrusion or disseisin. Under such circumstances, therefore, the possessors were deemed not liable to expulsion by mere entry, but the estate or interest of the person ousted was said to be *turned to a right* (y); and it became necessary for him to resort to a

179. The actions possessory were divided into writs of *entry* and writs of *assize*; the former being of such a nature as *disproved* the title of the tenant, by showing the unlawful commencement of his possession; the second of a nature to *prove* the title of demandant, by merely showing his or her ancestor's possession. 3 Bl. Com. 185.

(x) 2 Bl. Com. 196; 3 Bl. Com. 179.

(y) "By turning to a right it is

"generally meant, that the person "whose possession is usurped cannot "restore it by entry, and can only "recover it by action." Co. Litt. by Butl. 332 b, n. (1). Blackstone uses this expression as if it applied to the case where not only the entry, but the right to bring a possessory action, was taken away, and nothing remained but the mere *right, or right of property*, 2 Bl. Com. p. 197. But this is not the sense in which it has been ordinarily used.

real action either possessory or droitual. So he might be driven to betake himself to a real action even as against an abator, intruder, or disseisor, in consequence of having allowed twenty years to elapse without exercising his right of entry.

Here however it becomes necessary to notice the following exceptions:—First, that though in general the right of entry, as already stated, was taken away (or *toll*ed) by the descent so *cast* (as the term was) upon the heir of the abator, intruder, or disseisor, yet if the claimant were under any legal disability during the life of the ancestor, by whom the ouster was effected, such as infancy, or the like, the descent had no such operation. Secondly, that by the statute 32 Hen. VIII. c. 33, if the ouster took place by way of *disseisin*, no descent to the heir of the disseisor was to take away the entry, unless the disseisor himself had peaceable possession for five years. Lastly, that though in general there was no right of entry on a *deforciant*, yet a man might enter on his tenant at sufferance (*y*), [for such tenant hath no freehold, but only a bare possession, which may be defeated, like a tenancy at will, by the mere entry of the owner:]

Again, if the claimant, where his estate was turned to a right in the manner above described, neglected to resort to his possessory action within the period allowed by law in that behalf, (for every such action was subject to its appropriate time of limitation, varying from thirty to fifty years,) or if the ouster took place upon a discontinuance, in either of these cases the adverse party was considered as having acquired not merely an apparent, but an actual, *right of possession* (*z*) (subject however to be defeated in the event of a decision against him on the right of pro-

(*y*) As to tenant at sufferance, vide *sup.* vol. i. p. 273.

(*z*) 2 Bl. Com. 196; 3 Bl. Com. 179. These were the principal cases; but there was also that of judgment

being given against either party (whether by default or on trial of the merits) in a possessory action—for such judgment for ever bound the right of possession. 3 Bl. Com. 191

perty, or *mere right*, as it was also called (*a*),—the effect of which was that the claimant was driven to his real action *droitural* (to determine the right of property), as the only remaining remedy. Of such actions, the principal one was the *writ of right* (*b*), sometimes called, to distinguish it from others of the *droitural class*, the *writ of right proper*. They were all subject, like actions *possessory*, to a certain period of limitation, that in the *writ of right* (which was the most extended) being sixty years.

But though this was the antient and proper system of remedy provided by our law, for cases of ouster of land, it had long been nearly superseded in practice, by a comparatively modern invention of anomalous character, to which claimants had been driven to resort by the inadequacy of the regular methods. For the redress by entry was one rarely in fact available, particularly as the law required it to be made in a peaceable manner, and subjected to severe penalties those who attempted to regain their tenements by a strong hand (*c*). And with respect to the real actions, whether *possessory* or *droitural*, they were generally unacceptable remedies, from their liability to the following disadvantages—that the course of proceedings in them was dilatory and intricate (*d*);—that the judgment in them was conclusive, (so that the plaintiff failing by any accident in one, was not at liberty to bring another of the same species (*e*));—and that they could be brought only in one of the courts of Westminster Hall, viz. the Court of Common Pleas (*f*). From such disadvantages, however, personal actions were exempt; and

(*a*) 2 Bl. Com. 197.

(*b*) This was considered as "the highest writ in the law." 3 Bl. Com. 193. But besides this, there were writs in the nature of a writ of right, such as the writ of *formedon*, which was the remedy for tenant in tail on a discontinuance, for he could not have a writ of right proper. Ibid. 191.

A recent instance of a writ of right occurred in *Davies v. Lowndes*, 1 Bing. N. C. 597.

(*c*) Vide sup. p. 359.

(*d*) 3 Bl. Com. 184, 205; Reeves's Hist. Eng. L. vol. iv. p. 166.

(*e*) Reeves, ubi sup.

(*f*) Ibid. 170.

the practitioners of our courts were thus led to the device of adapting one of these to the object of recovering the possession of land, so as to preclude the necessity of resorting to an action real. This invention appears to be due to the reign of Hen. VII. or Hen. VIII. (*g*); and the personal action applied to the purpose was the species of trespass called trespass *de ejectione firmæ* (now compendiously called an ejectment, and ranked, contrary to its original character, as a mixed action), which lay where the plaintiff was a lessee for years, and claimed damages for the injury of ouster from his chattel real. The contrivance was preceded by a decision of the courts, declaring, that besides the judgment for damages, the plaintiff in an action of this kind, was entitled to an award of restitution of the term itself (*h*); and this point being once established, the object in view was obtained through the medium of a fiction, the nature of which will be hereafter particularly described, and of which it is sufficient at present to say, that it had the effect of enabling any party who had been ousted of land, whatever the nature of his title or the circumstances of the ouster might be, to bring his case forward in the name of a third person claiming in the character of his lessee for years, and complaining of an expulsion from the leasehold. Its applicability, however, was subject to this important exception, that as it involved an actual entry made, or supposed to be made, by the true claimant, on the lands in dispute, for the purpose of making the pretended lease, (it being held that a

(*g*) Reeves's Hist. Eng. L. vol. iv. p. 170, where it appears, that it was not till the reign of Hen. 8, that real actions began to give place to ejectments, though the practice of applying ejectments occasionally to the trial of titles, began as early as Hen. 7. Et vide 3 Bl. Com. 201.

(*h*) So adjudged, 14 Hen. 7; and the same doctrine had been previously laid down by Fairfax, 7 Edw. 4, 6 b,

though the contrary had been held in the time of Edw. 3, and Rich. 2. The courts at law seem to have adopted this new doctrine in emulation of the practice of the courts of equity, which obliged the ejector to make specific restitution. See 3 Bl. Com. 200; Reeves's Hist. Eng. L. vol. iii. p. 390; vol. iv. p. 165; and 1 A. & E. 751 (n.)

person out of possession could not lawfully convey title to another(i)), the fiction was incapable of being applied, except where such claimant had a *right of entry*; the effect of which exception was, that though real actions were in general supplanted by ejectments soon after its introduction, yet recourse was still necessarily had to the former kind of remedy in some particular instances. The principal of these were the case where a woman claimed dower; or where the ouster, which was the subject of complaint, had taken place by way of abatement, intrusion, or disseisin, and had been followed by a descent cast, or a lapse of twenty years without entry made; or where it had taken place by way of discontinuance; in the first of which cases it is to be observed, that there never had been any right of entry—the injury being a species of deforcement, as already explained; and in the three last, viz. the descent cast, the non-entry for twenty years, and the discontinuance, the right of entry which had once existed was at an end (j).

And such continued to be the state of the law with respect to the remedy upon ouster of land, during the long period that elapsed between the time of Henry VIII. and that of Will. IV.; but in the latter reign, the attention of the legislature having been particularly called to the improvement of our legal institutions, and among the rest to those which related to real property, it was deemed expedient, as regards the three last cases of ouster above enumerated, to place the law upon a different basis. For it

(i) To convey a title to another, when the grantor is not in possession of the land, falls under the legal offence of maintenance; “and indeed it “was doubted at first,” says Blackstone, “whether this occasional possession in ejectment,” taken merely for the purpose of conveying the title, “excused the lessor from the legal guilt “of maintenance.” 3 Bl. Com. 201.

(j) The account above given of the

former state of the law relating to real actions, is purposely condensed to the highest degree consistent with clearness of exposition. What Blackstone has written on this subject is much more copious, and exhibits a learning and ability not surpassed, perhaps, in any part of his Commentaries; but the recent changes of the law have almost annihilated the value of that part of his labours.

seemed unjust to the true owner of land, from whom the possession was withheld, to allow his right of entry to be defeated by such circumstances as those of descent cast and discontinuance; and inexpedient on the other hand to allow him any remedy whatever, after he had neglected to vindicate his right for more than twenty years, the period to which the proceeding by entry, and consequently by ejectment, had already been long confined. It appeared desirable, too, to expunge real actions in general from our list of remedies, as the greater part of them had been latterly found to be mere instruments of mischief in the hands of unprincipled practitioners, who employed them “to defraud persons in a low condition of life of their substance, under pretence of recovering for them large estates, to which they had no colour of title” (*k*). Under the influence of these views (suggested by the Real Property Commissioners, to whose labours we have before had occasion to refer) (*l*), an act was passed in the year 1833 (3 & 4 Will. IV. c. 27), containing *inter alia* the following provisions—that no descent cast or discontinuance happening after 31st Dec. 1833, should toll or defeat any right of entry, or action for the recovery of land—that except in certain cases of disability therein specified, no entry should be made or action brought to recover land, but within twenty years after the right accrued—and that no action, real or mixed, except writ of right of dower, dower *unde nihil habet*, *quare impedit*, or ejectment, should be brought after 31st Dec. 1834, with a saving only of some particular cases in which the right to bring an action of this description was preserved for a few years longer.

We may now revert to the *present* modes of remedy in the case of ouster, and first, in the case of land, or hereditaments corporeal. The only proper remedy here, is by way of specific recovery; a mere action for damages,

(*k*) First Report of Real Property Commissioners, p. 42.

(*l*) Vide sup. vol. i. p. 237.

though it will also lie, being in general obviously inadequate to the nature of the injury; and the only modes of obtaining a specific recovery, which are generally applicable, are those of entry or ejectment; there being, however, besides these, the two actions of dower formerly enumerated, by which redress is given for one particular species of deforcement (*m*).

Of entry, enough has been already said. As to ejectment, it is to be remarked, that it lies (as may be collected from preceding matter) wherever there exists a right of entry in the claimant; which indeed comprises, since the alterations introduced by the above-mentioned statute of 3 & 4 Will. IV. c. 27, almost every case in which there is any right whatever to recover land, whatever may be the nature of the title or of the ouster sustained (*n*). On the other hand, an ejectment cannot, as we have seen, be maintained where there is no right of entry; and therefore it will not lie for dower, nor (in general) upon an ouster of any hereditaments incorporeal; though in the particular case of an ouster of *tithes* it is otherwise; for that form of action is given [for tithes in the hands of lay appropriators, by the express purview of the statute

(*m*) There are some particular cases of ouster for which particular remedies are provided, besides those by action. In the case of a *forcible entry* and ouster, (vide vol. i. sup. p. 273), the statutes against forcible entries and detainers give the power to justices of the peace to restore possession. In cases between landlord and tenant, where half-a-year's rent is in arrear, and the tenant has deserted the premises and left the same uncultivated or unoccupied, the stats. 11 Geo. 2, c. 19, s. 16, and 57 Geo. 3, c. 52, authorize a proceeding before two justices of peace to obtain restitution. By 59 Geo. 3, c. 12, ss. 17, 24, 25, paupers intruding into parish property

may also be dispossessed by warrant of two justices of the peace; and by 1 & 2 Vict. c. 74, a method of proceeding before two justices in petty sessions, to obtain possession, is also provided for landlords in certain cases of holding over by tenants, when the rent does not exceed 20*l*.

(*n*) It lies between tenants in common, coparceners, or joint tenants, upon an actual ouster of one by the other. Co. Lit. 199 b; Doe d. Helling v. Hind, 11 East, 49. So one of several tenants in common, &c. may bring ejectment for his share against a stranger. Roe d. Raper v. Lonsdale, 12 East, 39.

[of 32 Hen. VIII. c. 7; which doctrine has since been extended by analogy to tithes in the hands of the clergy.]

As to the two actions of dower, which (as we have seen) are the remedies for the particular case of a widow ousted of her dower, they are both of the class of real actions (*o*). The first of them, the writ of right of dower, (which was one of the varieties of the writ of right proper (*p*),) has been at all times of rare occurrence, being adopted only in the very particular predicament of the widow's having been endowed of parcel and being deforced of the residue, lying in the same town, by the wrong of the same tenant. It is the other species of dower, *unde nihil habet*, which we commonly understand when an action of dower generally is mentioned, for of this some instances occasionally, though very rarely, occur, while the kind first mentioned is absolutely unknown in modern practice. Dower *unde nihil habet*, though not a writ of right proper, was one of the droitual division, being founded not on the possession, but the right of property. It must be brought by the widow, as demandant, against the tenant of the freehold, that is, the heir or his alienee (*q*); and its effect is to enable the former to recover from the latter the seisin of a third part of the tenements in demand, to be set forth to her in severalty by metes and bounds, together with damages and costs (*r*). That it has fallen so much into disuse, is attributable to the circumstance that the Court of Chancery exercises a concurrent jurisdiction with the courts of common law, where the object is to obtain an assignment of dower, and the title of the dowress is not in dispute (*s*). As to the particular forms of proceedings, whether in ejectment or

(*o*) Co. Litt. 31 a; vid. sup. vol. i. p. 252.

(*p*) 3 Bl. Com. 183.

(*q*) Com. Dig. Pleader, 2 Y. 15; 2 Saund. by Wms. 43 (*a*).

(*r*) 2 Saund. by Wms. 44 (*e*). By

3 & 4 Will. 4, c. 27, s. 41, arrears of dower cannot be recovered for more than the last six years.

(*s*) Rosc. Real Actions, 40; Chit. Gen. Pr. vol. i. p. 380; vol. ii. p. 420.

dower,—that subject must be postponed till we arrive at a subsequent part of this volume, where it is intended to treat in detail of the course of these and other actions.

With respect to the remedy upon ouster of hereditaments incorporeal, such as commons, advowsons and the like, these also, it is said (*t*), may be claimed in the action of dower, supposing the claimant to be a dowress, and tithes may be recovered (as we have seen) in ejectment, and a next presentation (as we shall see hereafter) in an action of *quare impedit*. But subject to such particular exceptions, there is in general, since the abolition of the mass of real actions, no remedy for specific recovery of property of this description; but the party injured may resort to the personal action of trespass on the case, in which he recovers such damages as he may have sustained by the invasion of his right (*u*). And this in general amounts to as complete a vindication of it as if he had obtained judgment for its specific recovery.

2. Having considered the injury of ouster, we now arrive at that of *trespass*, by which is here intended a trespass committed in respect of another man's *land*, by entry on the same without lawful authority, which, as distinguished from trespass to his person or his goods, is called trespass *quare clausum fregit* (*v*). [For the right of *meum et teum*, or property in lands, being once established, it follows, as a necessary consequence, that this right must be exclusive, that is, that the owner may retain to himself the sole use and occupation of his soil; every entry therefore thereon, without the owner's leave, and especially if contrary to his express order, is a transgression,] and being in the nature of an immediate and forcible injury thereto, a trespass. [The Roman laws indeed seem to have made a direct prohibition necessary, in order to constitute this injury, "*Qui alienum fundum ingreditur, potest a domino, si is prævideret, prohiberi ne ingrediatur* (*x*)."]

(*t*) Rosc. Real Actions, 40.

(*v*) As to the definition of trespass

(*u*) See *Challenor v. Thomas*, Yelv. in general, vide sup. p. 461.

143.

(*x*) Inst. 2, 1, 12.

[But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action of trespass will lie] to recover such damages as a jury may think proper to assess (*y*); and this injury is called trespass *quare clausum fregit* (*z*), or trespass for breaking a man's close, because [every man's land is, in the eye of the law, inclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an invisible boundary existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.]

One must have an actual possession (*a*) by entry, to be able to maintain an action of trespass *quare clausum fregit*; and [before such entry and possession one cannot maintain this action, though he hath the freehold in law (*b*). And therefore an heir, before entry (*c*), cannot have this action against an abater; and though a disseisee might have it against the disseisor for the injury done by the disseisin itself, at which time the plaintiff was seised of the land, yet he cannot have it for any act done after the

(*y*) In case of the offence called *forcible entry*, (vid. sup. p. 360,) an action will also lie by statute to recover treble damages. But this applies only to a degree of force calculated to excite fear (5 Car. & P. 1), and a proceeding under the statutes of forcible entry is not very usual.

(*z*) From the language of the writ of trespass (now disused), commanding the defendat to show cause *quare clausum querentis fregit*.

(*a*) 2 Rol. Ab. 553; *Wheeler v. Montefiori*, 2 Ad. & El. N.S. 133.

Blackstone says, (vol. iii. p. 210,) "that there must be a *property*, either absolute or temporary, in the soil, and actual possession by entry." It is clear, however, that he who has any exclusive possession may maintain the action, though he has no other property or interest; *Lambert v. Stroother*, Willes, 221; *Catteris v. Cowper*, 4 Taunt. 547; Com. Dig. Trespass.

(*b*) 2 Rol. Abr. 553. As to freehold in law, vid. sup. vol. i. p. 394.

(*c*) Ibid.

[disseisin, until he hath gained possession by re-entry : but then he may well maintain it for the intermediate damage done ; for after his re-entry, the law, by a kind of *jus post-liminii*, supposes the freehold to have long continued in him (*d*). Neither, by the common law, in case of an intrusion or deforcement could the party kept out of possession sue the wrongdoer by a mode of redress, which was calculated merely for injuries committed on the land while in *the possession* of the owner. But now by the statute 6 Ann. c. 18, if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements without the consent of the person entitled thereto, they are adjudged to be trespassers (*e*).]

Where there is an actual possession, this action may be maintained, even though the possession be of the vesture and herbage only (*f*), or of a crop growing on the land (*g*); and trespass may be maintained against a wrong-doer, even where the possession of the plaintiff is itself a wrongful one, as in the case of a tenancy at sufferance (*h*).

[A man is answerable for not only his own trespass, but that of his cattle also ; for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on),] and they there tread down his neighbour's herbage, or spoil his corn or his trees, [this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case ; by permitting him to distrein the cattle thus *damage feasant*, or doing damage, till the owner shall make him satisfaction ; or else by leaving him to the common remedy *in foro contentioso*, by action.]

(*d*) 11 Rep. 5.

(*e*) See also other legislative provisions in the case of *holding over*, sup. vol. i. p. 274.

(*f*) Dy. 285(b) ; 2 Roll. Abr. 549.

(*g*) Per Ld. Ellenborough, *Crosby v. Wadsworth*, 6 East, 609. Vide *Carlington v. Roots*, 2 Mee. & W. 248.

(*h*) 2 Rol. Ab. 551 ; *Graham v. Peat*, 1 East, 244.

In some cases a trespass *quare clausum fregit*, by entry on another's land or house, is justifiable; [as if a man comes thither to demand or pay money there payable; or to execute in a legal manner the process of the law;] or by the licence of the plaintiff himself. [Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping of such inn or public house, he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrein for rent, and a reversioner to see if any waste be committed on the estate, for the apparent necessity of the thing (*i*);] and it has been held that [the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land,] if no greater damage be done than is necessary, [because the destroying such creatures is said to be profitable to the public (*j*). But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio* (*k*); as if one comes into a tavern, and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner, this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass (*l*). But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser, for this is only a breach of contract.] [So if a landlord distreined for rent, and wilfully killed the distress, this by the common law made him a trespasser *ab initio* (*m*); and

(*i*) Blackstone notices also, and apparently holds, the opinion, that by the common law of England the poor are allowed to enter on a man's ground and glean after harvest. But it has been since his time decided that no such right exists. *Steel v. Houghton*, 1 H. Bl. 51.

(*j*) *Geush v. Mynns*, Cro. Jac. 321;

Gundry v. Feltham, 1 T. R. 334. But see *Earl of Essex v. Capel*, coram Lord Ellenborough, Hertford assizes, A. D. 1809, Chitty's Game Law, 31.

(*k*) 8 Rep. 146; Finch, L. 47; *Bagshawe v. Goward*, Cro. Jac. 148.

(*l*) 2 Rol. Ab. 561.

(*m*) Finch, L. 47.

[so indeed would any other irregularity have done, till the 11 Geo. II. c. 19, which enacts, that no subsequent irregularity of the landlord shall make his first entry a trespass, but the party injured shall have a special action of trespass or on the case for the real specific injury sustained, unless tender of amends hath been made.]

A man may also justify in an action of trespass on other grounds; as by reason of a right of way, a right of common, or the like, or [on account of the freehold and right of entry being in himself; and this last defence brings the title of the estate in question.] This is, therefore, one of the ways employed to try title in cases of ouster, [though it is not so usual as that by ejectment, because that not only gives damages for the ejection, but also possession of the land; whereas, in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed.]

3. We are next to consider the injury of *Nusance*. [Nusance, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds, *public* or *common* nuisances, which affect the public, and are an annoyance to all the queen's subjects, for which reason we must refer them to the class of public wrongs or crimes (*n*); and *private* nuisances, which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another (*o*),] and not amounting to a trespass (*p*). [We will therefore first mark out the several kinds of nuisances, and then their respective remedies.

First, as to *corporeal* hereditaments. If a man builds his house so close to mine, that his roof overhangs my roof, and the water flows off his roof upon mine, this is

(*n*) Vide sup. p. 356.

(*o*) F. N. B. 188.

(*p*) The definition, it is conceived,

must be so qualified, both for the sake of accuracy and of clearness.

[a nuisance, for which an action will lie (*q*).] And the case is the same if the boughs of his tree are allowed to grow, so as to overhang my land, which they had not been accustomed to do (*r*). [Also, if a person keeps his hogs, or other noisome animals, so near the house of another,] previously built and inhabited (*s*), [that the stench of them incommodes him, and makes the air unwholesome,] this is a [nuisance, as it tends to deprive him of the use and benefit of his house (*t*). A like injury is, if one's neighbour sets up and exercises any offensive trade, as a tanner's, a tallow chandler's, or the like, for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non lædas*;" this, therefore, is an actionable nuisance (*u*).] And the case is the same if a man, by carelessness in excavating his own ground, causes the fall of a house erected on land adjoining (*x*). [But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall or the like,] or opening a window upon a neighbour, whereby his privacy is disturbed (*y*), [this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance (*z*).] The injuries that have been specified chiefly concern houses. As to lands, we may remark, that [if one erects a smelting house for lead so near the land of another, that the vapour and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance (*a*).] And upon the same principle it may be laid down generally, [that if one does

(*q*) F. N. B. 184.

(*r*) *Norris v. Baker*, 1 Rol. Rep. 393; *Lodie v. Arnold*, 2 Salk. 458.

(*s*) This is a necessary qualification, for if I build my house near his hog-stye, the case is altered, and it is *damnum absque injuriâ*. 1 Smith's Leading Cases, 131.

(*t*) *Aldred's case*, 9 Rep. 58; *R. v. White*, 1 Burr. 337.

(*u*) *Morley v. Pragnel*, Cro. Car. 510.

(*x*) *Dodd v. Holme*, 1 Ad. & El. 493; vide *Wyatt v. Harrison*, 3 B. & Adol. 876.

(*y*) *Chandler v. Thompson*, 3 Camp. 82.

(*z*) 9 Rep. 58.

(*a*) 1 Rol. Ab. 89.

[any other act in itself lawful, which yet being done in that place, necessarily tends to the damage of another's land, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also, if my neighbour ought to scour a ditch and does not, whereby my land is overflowed, this is an actionable nuisance (*b*).

Next, as to incorporeal hereditaments (*c*), the principle of the law is the same. Thus, [it is a nuisance to stop or divert water that ought to run to another's meadow or mill (*d*);] or [if I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance; for, in the first case, I cannot enjoy any right at all; and in the latter, I cannot enjoy it so commodiously as I ought (*e*). Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair (*f*). But in order to make this out to be a nuisance, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For Sir M. Hale (*g*) construes the *dieta*, or reasonable day's journey mentioned by Bracton (*h*), to be twenty miles, as indeed it is usually understood, not only in our own law (*i*), but also in the civil (*k*), from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no nuisance, for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; that the day being divided into three

(*b*) F. N. B. 184.

(*f*) F. N. B. 184; 2 Roll. Ab.

(*c*) As to these, vide sup. vol. ii. 140.

p. 3.

(*g*) On F. N. B. 184.

(*d*) F. N. B. 184.

(*h*) L. 4, c. 46.

(*e*) F. N. B. 183.

(*i*) 2 Inst. 567.

(*k*) Ff. 2, 11, 1.

[parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *primâ facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so: but if it be on any other day, it *may* be a nuisance, though whether it is so or not, cannot be intended or presumed, but I must make proof of it to the jury. If a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the queen's subjects, otherwise he may be grievously amerced (*l*). It would be therefore extremely hard if a new ferry were suffered to share his profits, which does not also share his burthen. But where the reason ceases, the law also ceases with it. Therefore it is no nuisance to erect a mill so near to mine, as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade or a school in neighbourhood or rivalry with another, for by such emulation the public are like to be gainers; and if the new mill or school occasion a damage to the old one, it is *damnum absque injuriâ* (*m*).]

It remains only to state the remedies which the law has given for this injury of nuisance. And here, without entering into the jurisdiction which a court of equity exercises by way of *injunction* to stay nuisances or prevent their farther progress (a subject which does not properly belong to the present place), or the remedy by the act of the party in abating them (a subject to which we have before sufficiently adverted (*n*)), we shall only notice the remedy by action or suit at law. This is an action of trespass on the case; in which, however, the party injured [can only recover a satisfaction in damages for the injury

(*l*) 2 Rol. Ab. 140.

(*n*) Vide sup. p. 360.

(*m*) Hale on F. N. B. 184.

[sustained, but cannot thereby abate the nuisance. Indeed every continuance of a nuisance is held to be a fresh one (*p*); and therefore a fresh action will lie, and very exemplary damages will probably be given, if after one verdict against him the defendant has the hardness to continue it (*q*).]

4. The fourth subject for consideration is *Waste*. This is spoil and destruction done, or allowed to be done, to houses, woods, lands, or other corporeal hereditaments, by the tenant thereof during the continuance of his tenancy (*r*), [which the common law expresses very significantly by the word *vastum*; and this *vastum* or waste is either voluntary or permissive,] the one a matter of commission, as by pulling down a house, the other of omission only, as by suffering it to fall by want of necessary reparations. [Whatever does a lasting damage to the freehold or inheritance is waste. Therefore the removing wainscot, floors, or other things once fixed to the freehold of a house, is,] generally speaking, [waste;] though it is held, by way of exception from the ordinary rule, that a particular tenant, who has made erections for the purposes of trade, or has put up ornamental fixtures, may lawfully remove them (*s*). [If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste; but otherwise if the house be burned by the carelessness or negligence of the lessee; though now, by the statute 6 Ann. c. 31, continued by 10 Ann. c. 14, s. 1,] and 14 Geo. III. c. 78, no action will lie against a person in whose house, chamber or building, or on whose estate any fire shall accidentally begin (*t*). [But

(*p*) 2 Leon. pl. 129; *Beswick v. Cunden*, Cro. Eliz. 402; *Thompson v. Gibson*, 7 M. & W. 456.

(*q*) Among the real actions now abolished, there were two by which the actual removal of the nuisance might be effected, the *assise of nuisance* and the writ of *quod permittat prosternere*; as to which see 3 Bla. Com.

220.

(*r*) Co. Litt. 53; 2 Bla. Com. 281; 3 Bla. Com. 223.

(*s*) Vide sup. vol. ii. p. 261.

(*t*) See *Turbervill v. Stamp*, 1 Comyn, 31; 1 Salk. 13; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Lord Canterbury v. Attorney-General*, 1 Ph. 306.

[in both these cases, a tenant bound by covenant or other express contract to keep the house in repair, is compellable to rebuild, unless the contract was made expressly subject to exception in the event of such inevitable accident.] [Waste may also be committed in ponds, dove-houses, warrens, and the like, by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance (*u*). Timber also is part of the inheritance (*x*). Such are oak, ash and elm in all places; and in some particular counties, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste (*y*). But underwood the tenant may cut down at any seasonable time that he pleases (*z*), and may take sufficient estovers (*a*), of common right, unless restrained (which is usual) by particular covenants or exceptions (*b*). The conversion of land from one species to another is waste. To convert wood, meadow, or pasture into arable, to turn arable, meadow, or pasture into woodland, or to turn arable or woodland into meadow or pasture, are all of them waste (*c*). For, as Sir Edward Coke observes (*d*), it not only changes the course of husbandry, but the evidence of the estate, when such a close, which is conveyed and described as pasture, is found to be arable, and *è converso*. And the same rule is observed, for the same reason, with regard to converting one species of *edifice* into another, even though it is improved in its value (*e*). To open the land to search for mines of metal, coal, &c. is waste, for that is a detriment to the inheritance (*f*); but if the pits or mines were open before, it is no waste for the tenant to continue

(*u*) Co. Litt. 53.

(*x*) 4 Rep. 62.

(*y*) Co. Litt. 53.

(*z*) 2 Rol. Abr. 817.

(*a*) Vide sup. vol. i. p. 241.

(*b*) Co. Litt. 41.

(*c*) Lord Darcy v. Askwith, Hob. 296.

(*d*) Co. Litt. 53.

(*e*) Cole v. Green, 1 Lev. 309.

(*f*) 5 Rep. 12.

[digging them for his own use (*g*), for it is now become the mere annual profit of the land. These three are the general heads of waste, viz. in houses, in timber, and in land; though, as was before said, whatever tends to the destruction or depreciation of the value of the inheritance is considered by the law as waste.] And, in general, the commission of any act of this tendency is wrongful on the part of the tenant seised of any estate less than the inheritance. But a tenant in fee, whether fee-simple or fee-tail, is not impeachable for waste; nor is a tenant in tail, even after possibility of issue extinct, because his estate was at its creation an estate of inheritance (*h*). Nor is a lessee for life or years, if his lease be expressly made, as is sometimes the case, “without impeachment of waste” (*i*); neither does the law regard any act, by whomsoever committed, as amounting to waste, unless there be some substantial and considerable damage (*k*); and therefore in a case where the damage done was found to be less than 40*d.*, judgment was given for the defendant (*l*).

[The persons who may be injured by waste are such as have some *interest* in the estate wasted;] and therefore no person as expectant heir to an estate in fee simple or fee tail can complain of this injury; but the tenant in fee simple or tail for the time being may commit whatever waste he pleases. [One species of interest which is injured by waste, is that of a person who has a right of common in the place wasted, especially if it be common of estovers, and the owner of the wood demolishes the whole wood, and thereby destroys all possibility of taking estovers (*m*).] But the most usual and important interest that is hurt by waste, is that of him who hath the re-

(*g*) Lord Darcy v. Askwith, ubi sup.

(*h*) Vide vol. i. p. 244.

(*i*) Even in these cases, however, a court of equity will not permit the tenant to *destroy* the premises, as by pulling down a house, &c. Ashton

v. Ashton, 1 Ves. sen. 264.

(*k*) Doe d. Grubb v. Lord Barlington, 5 B. & Ad. 507.

(*l*) Vide The Governors, &c. of Harrow School v. Alderton, 2 Bos. & Pul. 86.

(*m*) F. N. B. 59; 9 Rep. 112.

mainder or reversion after a particular estate for life or years in being. Here, if the particular tenant, be it the tenant in dower or by curtesy, or the lessee for life or years, commits any waste, it is a manifest injury to him that is in expectancy, as it tends to dismember the place of its most desirable incidents and ornaments, among which timber and houses may justly be reckoned the principal. [And in this, a parson, vicar, archdeacon, and the like, who are seised, in right of their churches, of any remainder or reversion, are included.] Indeed they may complain as of an injury to the *inheritance*; [for they in many cases have for the benefit of the church, and of the successor, a fee simple qualified, though they are not so seised in their own right, but *jure ecclesiæ* only (*o*).]

The form of remedy for this injury is by action of trespass on the case against the wrong-doer, to recover such damages as a jury may award; the injury, though direct in its nature, being committed in respect of an intangible hereditament, viz. the plaintiff's reversionary interest, to which the action of trespass would not be appropriate. And besides this action, the Court of Chancery exercises in cases of waste a very important jurisdiction by way of injunction, similar to that already referred to in cases of nuisance. Prior to the provisions of the late statute 3 & 4 Will. IV. c. 27, for abolition of real and mixed actions, there was also another remedy at law, in comparison with which, indeed, that by action on the case was but of recent introduction, viz. the mixed action of *waste*, in which, by the provisions of the Statute of Gloucester, 6 Edw. I. c. 5, the place itself that was wasted might be recovered against the tenant by way of forfeiture for the wrong committed, together with treble damages (*p*); and in aid of which

(*o*) Co. Litt. 341.

(*p*) By our more antient law, waste was not punishable in any tenant except guardian in chivalry, tenant in dower and tenant by the curtesy; and these were punishable only by way of

damages (2 Inst. 146), except in the case of a guardian who forfeited his wardship by the provisions of the Great Charter (*ibid.* 300). But the Statute of Gloucester inflicted forfeiture and treble damages in the case

resort might also be had to a writ of *estrepement*, to prevent the commission of this injury *pendente lite* (*q*). But even before the abolition of these two last-mentioned proceedings by the statute above referred to, they had been for the most part supplanted by the personal action of trespass on the case; the action of waste having been subject to this inconvenience, that it could not be maintained, except by the person who had the immediate reversion or remainder in fee or in tail expectant on the estate of the person against whom the action was brought; whereas an action on the case may be maintained by a person having any immediate interest in expectancy, whether in fee or for life or years (*r*). It is also to be observed with respect to this latter remedy, that it may be had not only against the tenant, but against any stranger by whom an act of waste has been committed; and that it will lie at the suit of one joint tenant or tenant in common against another who has destroyed the subject of joint or common property (*s*); and that an analogous action on the case, called in this instance an action for *dilapidations*, may also be maintained by a rector or vicar against his predecessor, or the executors of his predecessor—and this for *permissive* as well as *voluntary* waste—it being held that the incumbent of a living is bound to keep the parsonage house and chancel in good and substantial repair, restoring and rebuilding where necessary, according to the original form (*t*). But it seems that in general no action on the case will lie for waste of a kind merely permissive (*u*); and it has been so adjudged

of waste committed by tenant in dower, by the curtesy, for life, or years. It is to be observed, that there was no remedy by way of *entry*, in respect of a forfeiture of this kind; Co. Litt. 233 b, 234 a. It would seem therefore that ejectment is not maintainable, nor, since the abolition of the action of waste, any remedy by action whatever, to recover the land wasted.

(*q*) 3 Bl. Com. 225.

(*r*) Co. Litt. 53 b, 54 a, 218 b; 2 Saund. by Wms. 252, n. (7).

(*s*) 1 Chit. Gen. Pr. 272.

(*t*) *Wise v. Metcalfe*, 10 Barn. & Cres. 299; *Bird v. Smith*, 4 B. & Adol. 826; *Downes v. Craig*, 9 Mee. & W. 166; 1 Saund. 216 b, n. (*a*).

(*u*) Vide Roscoe, Real Actions, 383.

with respect to a tenant for years or at will (*x*); though where a tenant of any description is under express contract to repair, he will of course be liable, even in the event of permissive waste, to an action founded on such contract.

[5. *Subtraction* is the fifth species of injury affecting a man's real property, and happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it.] And these consist in general of *fealty, suit of court, rent, and customary services*.

Fealty and suit of court are among the conditions upon which the antient lords granted out their lands to their feudatories, and consist in the obligation on the part of these tenants to take the oath of fealty (*y*) to the lord, and attend and follow his courts by serving on juries there; and of the same nature also are such *rents* as fall under the legal denomination of rent service (*z*), these being the stated returns due either by antient or modern reservation, from the tenant to his lord, whether in provisions, arms, or the like, or in money; to which almost all rents are now reduced. And the subtraction or non-observance of [any of these conditions, by neglecting to swear fealty, to do suit, or to render rent, is an injury to the freehold of the lord by diminishing the value of his seignory.] Besides which, there arises, whenever rent becomes due, whatever may be its nature, and whether it is connected with the tenure or not, a *debt* (*a*) between the parties; the non-payment of which is a pecuniary injury independent of the wrong done to the freehold.

For fealty and suit of court, and in general for all rents, there is the peculiar remedy by *distress*, [and it is the only remedy at the common law, for the two first of these.] The nature of a distress has been already explained (*b*); and it may here suffice to remember that it is a taking of

(*x*) *Herne v. Benbow*, 4 Taunt. 764; *Jones v. Hill*, 7 Taunt. 392;

Gibson v. Wells, 1 N. R. 290.

(*y*) As to fealty, vide sup. vol. i. p. 164.

(*z*) As to rent service, sup. vol. ii. p. 24.

(*a*) As to debt, *ibid.* p. 186.

(*b*) Vide sup. p. 361.

[personal chattels out of the possession of the wrong-doer into that of the party injured, to procure a satisfaction for a wrong committed. And for the most part it is provided that distresses be reasonable and moderate, but in the case of fealty and suit of court no distress can be too large (c); for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory; and be it of what value it will, there is no harm done, as it cannot be sold or made away with, but must be restored immediately on satisfaction made. A distress of this nature, that has no bounds with regard to its quantity, and may be repeated from time to time until the stubbornness of the party is conquered, is called a *distress infinite*.] Besides the remedy by distress, the law also formerly provided, for the case of rent in arrear, several kinds of real action, viz. the assise of *mort d'ancestor* or *novel disseisin*, the writ *de consuetudinibus et servitiis*, the writ of *cessavit*, and the writ of right *sur disclaimer* (d). But all such remedies having been long wholly disused, and now abolished by the late statute 3 & 4 Will. IV. c. 27, the only actions which now lie for rent are of the personal class. The nature of these will be more particularly explained when we arrive at the consideration of that species of injury which consists of breach of contract.

As to *customary services*, the one of most frequent occurrence is that of [doing suit to another's mill, where the persons resident in a particular place, by usage time out of mind, have been accustomed to grind their corn at a certain mill (e).] If under such circumstances any of them

(c) Finch, L. 285.

(d) See as to these, 3 Bl. Com. 232; Roscoe on Real Actions, 63, 75, 32, 31. So there were several real actions to redress the oppressions of the lord; as by writ *ne injuste vexes*, and writ of *mesne*. See as to these, 3 Bl. Com. 234; Roscoe on Real Actions,

37, 38.

(e) As to this service or custom, vide *Harbin v. Green*, Hob. 233; *Drake v. Wigglesworth*, Willes, 654; *Vyvyan v. Arthur*, 1 B. & C. 410; *Richardson v. Walker*, 2 B. & C. 827; *Richardson v. Capes*, *ibid.* 841.

go to another mill and withdraw their suit (their *secta*, à *sequendo*) from the antient mill, this is not only a damage, but an injury to the owner, because this custom might have a very reasonable foundation, [viz. the erection of such mill by the ancestors of the owner, for the convenience of the inhabitants, on condition that when erected they shall grind their corn there only.] And for this injury the owner might formerly [have a writ *de secta ad molendinum* (*f*), commanding the defendant to do his suit at that mill, or show good cause to the contrary.] In like manner, [the Register (*g*) informs us that a man may have a writ of *secta ad furnum, secta ad torrale, et ad omnia alia hujusmodi*; for suit done to his public oven or bakehouse, or to his kiln or malthouse,] or the like. [But besides these special remedies for subtraction to compel the specific performance of the service due, an action on the case will also lie for all of them to repair the party injured in damages.] And the former remedies being now abolished by the statute just referred to, the action on the case is now the only means of redress.

[6. The sixth and last species of real injuries is that of *disturbance*,] which is the wrongful obstruction of the owner of an incorporeal hereditament, in its exercise or enjoyment; and [we shall consider five sorts of this injury, disturbance of *franchises*, disturbance of *common*, disturbance of *ways*, disturbance of *tenure*, and disturbance of *patronage*.

Disturbance of *franchises* (*h*) happens when a man has the franchise of holding a court leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays (*i*) or (in short) any other species of franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. As if another by distress, menaces

(*f*) F. N. B. 123. See as to this, Roscoe on Real Actions, 36.

(*g*) Fol. 153.

(*h*) As to franchises, vide sup. vol. ii. p. 14.

(*i*) As to waifs and estrays, vide sup. vol. ii. p. 561.

[or persuasions, prevails upon the suitors not to appear at my court, or obstruct the passage to my fair or market, hunts in my free warren, or refuses to pay me the accustomed toll, or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty; in every case of this kind, all which it is impossible here to recite or suggest, there is an injury done to the legal owner; his property is damnified, and the profits arising from such his franchise are diminished. To remedy which, as the law has given no other action, he is therefore entitled to sue for damages by an action on the case; or in case of toll may take a distress, if he pleases (*k*).

The disturbance of *common* (*l*) comes next to be considered—where any act is done by which the right of another to his common is incommoded or diminished. This may happen, 1. Where one who hath no right of common puts his cattle into the land, and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one who hath a right of common puts in cattle which are not commonable, as hogs and goats, which amounts to the same inconvenience. But the lord of the soil may by custom or prescription (but not without) put a stranger's cattle into the common (*m*), and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common (*n*).] In general, however, [if the beasts of a stranger or the uncommonable cattle of a commoner be found upon the land, the lord or any of the commoners may] drive them off, or [distrein them *damage feasant* (*o*), or the commoner may bring an action on the case to recover damages,] or the lord an action of trespass. 2. [Another disturbance of common is by surcharging it, or putting more cattle therein than the pasture and herbage will sus-

(*k*) Heddy v. Wheelhouse, Cro. Eliz. 558.

(*l*) As to common, vide sup. vol. ii. p. 3.

(*m*) 1 Rol. Ab. 396.

(*n*) Co. Litt. 122.

(*o*) 9 Rep. 112.

[tain, or the party hath a right to do. In this case, he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can properly speaking only happen where the common is appendant or appurtenant, and of course limitable by law, or where, when in gross, it is expressly limited and certain; for where a man hath common in gross, *sans nombre*, or *without stint*,] as it is more commonly called, [he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts (*p*); for the law will not suppose that at the original grant of the common the lord meant to exclude himself. The usual remedies for surcharging the common are either by distreining so many of the beasts as are above the number allowed, or else by an action of trespass, both which may be had by the lord; or, lastly, by an action on the case for damages, in which any commoner may be plaintiff,] and that as well against the lord, as against another commoner (*q*). And, besides these, recourse might formerly be had to a writ of admeasurement of pasture, which is among the real actions now abolished. 3. In addition to the above, [there is another disturbance of common, when the owner of the land, or other person, so incloses or otherwise obstructs it, that the commoner is precluded from enjoying the benefit to which he is by law entitled (*r*). This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common (*s*). Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities that they de-

(*p*) 1 Rol. Ab. 399.

(*q*) Freem. 273; 1 Saund. by Wms. 346, n. (2).

(*r*) It is to be remembered, however, that the lord, or other proprietor of the waste, may *approve*, that is, inclose the land, and convert it to the

uses of husbandry, provided he leaves sufficient common to the tenants, according to the proportion of their land. As to this, vide sup. vol. ii. p. 7.

(*s*) *Leverett v. Townsend*, Cro. Eliz. 198.

[your the whole herbage, and thereby destroy the common;] though on the other hand, the lord may lawfully erect a warren, provided the rabbits do not increase so as to occasion this inconvenience (*t*). For each of these injuries the commoner might formerly have not only his action of trespass on the case, but a real action of *novel disseisin* or *quod permittat* (*u*); but the latter remedies being now abolished, the former is now the only form of action available in such cases, though in certain instances, as where the obstruction is occasioned by a fence or wall, the law allows the commoner to *abate*, or throw it down (*v*).

4. In the last place may be noticed the injury of depasturing forests, commons and open fields with sheep or lambs infected with scab or mange; for remedy of which it is provided by 38 Geo. III. c. 65, *inter alia*, that the offender shall be liable to a pecuniary penalty on conviction before a justice of the peace.

[The third species of disturbance, that of *ways*, is very similar in its nature to the last,] it principally happening when a person who hath a right of way over another's grounds [is obstructed by inclosures or other obstacles, or by ploughing across it, by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. But as this mode of disturbance in general amounts to the injury of nuisance, which we had occasion to consider in a former place, it will not be necessary to dilate upon it under the present head. We shall only add therefore that the remedy is by action on the case.

4. The fourth species is that of disturbance of *tenure*, or breaking that connection which subsists between the lord

(*t*) *Bellew v. Langdon*, Cro. Eliz. 876; *Hadesden v. Gryssel*, Cro. Jac. 195; *Hassard v. Cantrell*, Lutw. 108; 3 Bl. Com. 237.

(*u*) See 3 Bl. Com. 220; Roscoe, Real Actions, p. 40.

(*v*) 1 Saund. by Wms. 353 a. The

commoner, however, cannot cut down trees wrongfully planted by the lord, or kill his rabbits destroying the common, or even fill up the coney-burrows; but his remedy is by action on the case only. Ibid.

[and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of, and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord (*x*), and gives him a reparation in damages against the offender by an action on the case.

5. The fifth and last species of disturbance, but by far the most considerable, is that of disturbance of *patronage*, which is a hindrance or obstruction of the patron (*y*) to present his clerk to a benefice.

This injury was distinguished at common law from another species of injury, called *usurpation*, which is an absolute ouster or dispossession of the patron, and happens when a stranger that hath no right presenteth a clerk, and he is thereupon admitted and instituted (*z*); in which case of usurpation the patron lost by the common law not only his turn of presenting *pro hâc vice*, but also the absolute and perpetual inheritance of the advowson, so that he could not present again upon the next avoidance, unless in the meantime he recovered his right by a real action, viz. a *writ of right of advowson* (*a*). The reason given for his losing the present turn, and not ejecting the usurper's clerk, was, that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the

(*x*) Hal. Anal. c. 40 ; 1 Rol. Ab. 108.

(*y*) As to patronage, or the right of presentation to benefices, vide sup.

p. 78.

(*z*) Co. Litt. 277. As to admission and institution, vide sup. p. 80.

(*a*) 6 Rep. 49.

[right of any patron whatever. And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation] and consequent fulness or *plenarty* (as it was called) of the church, by the act of the usurper, his own possession of the advowson was considered as displaced; and the law allowed no remedy, either by presentation or possessory action, to a person put out of possession of an hereditament of this description. [The only remedy therefore which the patron had left, was to try the mere right in a writ of right of advowson, which was a peculiar writ of right framed for this special purpose, but in every other respect corresponding with other writs of right (*b*); and if a man recovered therein, he regained the possession of his advowson, and was entitled to present at the next avoidance (*c*).] Thus stood the common law.

[But bishops in antient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by statute Westm. 2, 13 Edw. I. c. 5, s. 2,] that if the possessory action of *quare impedit* (or another of the same class, called an assize of *darreign presentment* (*d*), and now abolished) (*e*) be brought within six months after the avoidance, the patron shall, notwithstanding such usurpation, recover that very presentation; which gives back to him the seisin of the advowson. [Yet still, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was driven to the long and hazardous process of a writ of right. To remedy which, it was farther enacted by statute 7 Ann.

(*b*) F. N. B. 30. As to writs of right generally, vide sup. p. 459.

(*c*) F. N. B. 36.

(*d*) The assize of *darreign presentment* lay only where a man had an advowson by descent from his ances-

tors; but the writ of *quare impedit* is equally remediable whether a man claims title by descent or by purchase. 3 Bl. Com. 245.

(*e*) By 3 & 4 Will. 4, c. 27, s. 36,

[c. 18, that no usurpation shall displace the estate or interest of the patron, or turn it to a mere right, but that the true patron may present,] or maintain a *quare impedit*, [upon the next avoidance, as if no such usurpation had happened. So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation,—that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligenee; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper with regard to any future avoidance, but only to the present vacancy; it cannot indeed be remedied after six months are past; but during those six months it is only a species of disturbance.]

The above-mentioned remedy by *quare impedit* is [now the only action used in case of the disturbance of patronage,] and the course of proceeding in it will hereafter be considered at large in its proper place (*f*). At present we shall only notice the circumstances by which it is usually preceded.

[Upon the vacancy of a living the patron, we know, is bound to present within six calendar months (*g*), otherwise it will lapse to the bishop. But if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient (*h*), unless the church be full, or there be notice of any litigation. For if any opposition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered is void by the ecclesiastical law; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity (*i*). But if two presentations be offered to the bishop upon the same avoidance, the church is then

(*f*) By 4 & 5 Will. 4, c. 39, *costs* are given in this as in other actions, which was not formerly the practice.

(*g*) Vide sup. p. 117.

(*h*) Vide sup. p. 119.

(*i*) *Hitching v. Glover*, 1 Rol. Rep. 191.

[said to become *litigious*; and if nothing farther be done, the bishop may suspend the admission of either and suffer a lapse to incur. Yet if the patron or clerk on either side request him to award a *jus patronatus*, he is bound to do it. A *jus patronatus* is a commission from the bishop, directed usually to his chancellor and others of competent learning, who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron (*j*); and if upon such inquiry made and certificate thereof returned to the commissioners, he admits and institutes the clerk of that patron whom they return as the true one, the bishop secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts.

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela* (*k*), which is a complaint in the nature of an appeal from the ordinary to his next immediate superior, as from a bishop to the archbishop; and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant.

Thus far matters *may* go on in the mere ecclesiastical course; but in contested presentations they seldom go so far; for upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his *quare impedit* for the temporary injury done to his property in disturbing him in his presentation.] For the patron [is always plaintiff in this action, and not the clerk, as the law supposes the injury to be offered to the former only, by obstructing or refusing the admission of his nominee, and not to the latter, who hath no right in him till institution, and of course can suffer no injury.] But as to the parties against whom the action is to be brought, it is to be observed that all these three persons, the pseudo-patron, his clerk, and the ordinary, may be disturbers of a right of advowson: [the pretended patron by presenting to a

(*j*) 1 Burn, 24.

(*k*) Ibid. 160.

[church to which he has no right, and thereby making it litigious or disputable; the clerk by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary by refusing to admit the real patron's clerk, or admitting the clerk of the pretender.] And if the delay arises from the bishop alone, [as upon pretence of incapacity or the like, then he only is named as defendant; but if there be another presentation set up, then the pretended patron and his clerk are also joined in the action; or it may be brought against the patron and his clerk, leaving out the bishop, or against the patron only. But it is most advisable to bring it against all three; for if the bishop be left out, and the suit be not determined till the six months are past, the bishop is entitled to present by lapse; for he is not party to the suit (*l*); but if he be named, no lapse can possibly accrue till the right is determined. If the patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate (*m*); for the right of the patron is the principal question in the cause (*n*). If the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reason it is the safer way to insert all three.]

Finally, we may remark, that though in a *quare impedit* the patron only, and not the clerk, is allowed to sue the disturber, yet by virtue of several acts of parliament (*o*), there is one species of presentation in which a remedy to be sued in the temporal courts is put into the hands of the clerks presented, as well as of the owners of the advow-

(*l*) *Lancaster v. Lowe*, Cro. Jac. 93.

(*m*) *Elvis v. Archbishop of York*, Hob. 392.

(*n*) 7 Rep. 25.

(*o*) St. 3 Jac. 1, c. 5; 1 W. & M. c. 26; 12 Ann. st. 2, c. 14; 11 Geo. 2, c. 17.

son, that is, the presentation to such benefices as belong to Roman Catholic patrons; which, according to their several counties, are vested and secured to the two universities of Cambridge and Oxford. [And particularly by the statute of 12 Ann. st. 2, c. 14, s. 4, a new method of proceeding is provided, viz., that beside the actions of *quare impedit*, which the universities as patrons are entitled to bring, they or their clerks may be at liberty to file a bill in equity against any person presenting to such livings and disturbing their right of patronage, or his *cestui que trust*, or any other person whom they have cause to suspect, in order to compel a discovery of any secret trusts for the benefit of Papists, in evasion of those laws, whereby this right of advowson is vested in these learned bodies; and also (by the stat. 11 Geo. II. c. 17) to compel a discovery whether any grant or conveyance, said to be made of such advowson, were made *bonâ fide* to a Protestant purchaser for the benefit of Protestants, and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular law, and calculated for a particular purpose, but in no instance but this does the temporal law permit the clerk himself to interfere in recovering a presentation of which he is afterwards to have the advantage.]

III. We are next to consider the injuries that may be offered to the right of *property in things personal*; and this, first, as regards things in *possession*; next, things in *actions* (p).

First, the rights of personal property in *possession* are liable to two species of injuries; the amotion or deprivation of that possession, and the abuse or damage of the chattels while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into several branches; [the unlawful taking them away,

(p) As to this distinction, vide sup. vol. ii. pp. 73, 74.

[the unlawful detaining them, though the original taking might be lawful;] and such tortious acts as subject the owner to the loss of them, though the wrong doer himself may be guilty neither of caption nor detainer. Our present subject will therefore involve four several heads:— 1, the injury of unlawfully taking chattels from the owner; 2, that of unlawfully detaining them from him; 3, that of depriving him of them by other unlawful means; 4, that of doing damage to them.

1. And, first, of an unlawful *taking*. The nature of this requires no illustration, and our attention therefore is to be chiefly directed to its remedy. [This is, in the first instance, the restitution of the goods themselves with damages for the loss sustained by such unjust invasion, which is effected by action of *replevin*, an institution which the Mirror (*r*) ascribes to Glanvil, chief justice to King Henry II. This obtains only in one instance of an unlawful taking, that of a wrongful distress (*s*); and this and the action of *detinue* (of which more will presently be said) are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner.] It is preceded by [a redelivery of the pledge (*t*), or thing taken in distress, to the owner, upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him (*u*); after which the distreinor may keep it till tender made of sufficient amends, but must then re-deliver it to the owner (*r*). And formerly, when the party distressed upon intended to dispute the right of the distress, he had no other process by the old common law, than by a writ of replevin, *replegiari facias* (*y*); which issued out of Chancery, commanding the sheriff to deliver the distress to the owner, and after-

(*r*) C. 2, s. 6.

(*s*) In practice replevin is applied to no other case; but it is said in the books to be applicable to others; Vin. Abr. Replevin (B), pl. 2; Co. Litt.

145 b.

(*t*) Vide sup. p. 366.

(*u*) Co. Litt. 145.

(*x*) 8 Rep. 147.

(*y*) F. N. B. 68.

[wards to do justice in respect of the matter in dispute in his own county court. But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage (z). For which reason the statute of Marlbridge (a) directs that (without suing a writ out of the Chancery) the sheriff immediately, upon plaint to him made, shall proceed to replevy the goods. And, for the greater ease of the parties, it is farther provided by statute 1 P. & M. c. 12 (b), that the sheriff shall make at least four deputies in each county, for the sole purpose of making replevins. Upon application therefore either to the sheriff or one of his said deputies, security is to be given, in pursuance of the statute of Westm. 2, 13 Edw. I. c. 2, first, that the party replevying will pursue his action against the distreinor, for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute; and, secondly, that if the right be determined against him, he will return the distress again; for which purpose he is also bound to find *plegios de retorno habendo*. Besides these pledges, the sufficiency of which is discretionary and at the peril of the sheriff, the statute 11 Geo. II. c. 19, requires that the officer granting a replevin on a distress for rent, shall take a bond, with two sureties, in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods: which bond shall be assigned to the distreinor, on request made to the officer; and, if forfeited, may be sued in the name of the assignee. And, certainly, as the end of all distresses is only to compel the party distrained upon to satisfy the debt or duty owing from him, this end is as well answered by such sufficient sureties as by retaining the very distress, which might frequently occasion great inconvenience to the owner; and that the law never wan-

(z) 2 Inst. 139.

(a) 52 Hen. 3, c. 21.

(b) As to the sheriff's authority

under this act, vide *Mounsey v. Dawson*, 6 A. & E. 752.

[tonly inflicts. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon, unless the distreinor claims a property in the goods so taken. For if by this method of distress the distreinor happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has regained possession, being a kind of personal *remitter* (c). If therefore the distreinor claims any such property, the party replevyng must sue out a writ *de proprietate probanda*, in which the sheriff is to try by an inquest, in whom the property, previous to the distress, subsisted (d). And if it be found to be in the distreinor, the sheriff can proceed no farther, but must return the claim of property to the Court of Queen's Bench or Common Pleas, to be there farther prosecuted, if thought advisable, and there finally determined (e).

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distreinor, then the sheriff is to replevy the goods (making use of even force if the distreinor makes resistance (f)), in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods or beasts are *eloigned, elongata*, carried to a distance, to places to him unknown; and thereupon the party replevyng shall have a writ of *capias in withernam, in vetito* (or, more properly, *repetito*) *namio*; a term which signifies a second or reciprocal distress (g) in lieu of the first, which was eloigned. It is therefore a command to the sheriff to take other goods of the distreinor in lieu of the distress formerly taken, and eloigned or withheld from the owner (h). So that here is now dis-

(c) Vide sup. p. 379.

(d) Finch, L. 316.

(e) Co. Litt. 145; Finch, L. 450.

(f) 2 Inst. 193.

(g) Smith's Commonw. b. 3, c. 10;

2 Inst. 141; Hickes's Thesaur. 164.

(h) F. N. B. 69, 73.

[tress against distress, one being taken to answer the other, by way of reprisal (*i*), and as a punishment for the illegal behaviour of the original distreiner. For which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming (*k*).

But in common cases the goods are delivered back to the party replevying, who is then bound to bring his action of replevin, which may be prosecuted in the county court, be the distress of what value it may (*l*). But either party may remove it to the superior courts of Queen's Bench or Common Pleas by writ of *recordari* (*m*);] and also [if in the course of proceeding any right of freehold comes in question the sheriff can proceed no farther (*n*); so that it is usual to carry it up in the first instance to the courts of Westminster Hall.] And so much for the present with respect to the action of replevin, the subsequent progress of which will be explained in a subsequent chapter, when we shall have occasion to describe the proceedings in a suit at law.

Another action for the unlawful taking of a man's goods, and one of much more extensive use, being applied to

(*i*) In the old northern languages the word *withernam* is used as equivalent to *reprisals*. Stiernhook *de Jure Sueon.* l. 4, c. 10.

(*k*) Raym. 475. The substance of this rule composed the terms of that famous question with which Sir Thos. More (when a student on his travels) is said to have puzzled a pragmatical professor in the University of Bruges, in Flanders, who gave a universal challenge to dispute with any person in any science: "*in omni scibili, et de quolibet ente*." Upon which Mr. More sent him this question—"*Utrum averia caruce capta in vetito namio, sint irreplegibilia*"—whether beasts of the plough, taken in *withernam*, are in-

capable of being replevied. Hoddesd. c. 5.

(*l*) 2 Inst. 139.

(*m*) 2 Inst. 23. The removal by the plaintiff is at pleasure; by the defendant, upon reasonable cause shown. F. N. B. 69, 70. But in practice the defendant's right to remove is never questioned. In some instances, other courts beside that of the sheriff have jurisdiction in replevin; but this is by prescription only. The removal from such of these as are courts of record, is by *certiorari*; from such of them as are manor courts, by *accedas ad curiam*. Roscoe on Real Actions, 628.

(*n*) Finch, L. 317.

every injury of that description, while replevin is confined to cases of wrongful distress, is the action of trespass. [As if a man takes the goods of another out of his actual or virtual possession without having a lawful title so to do, it is an injury, which, though it doth not amount to felony unless it be done *animo furandi*, is nevertheless a transgression for which an action of trespass *vi et armis* will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it.] Or the party [may at his choice have another remedy in damages, by action of trover and conversion, of which more will presently be said.

2. Deprivation of possession may also be by an unjust *detainer* of another's goods, although the original taking was lawful. As if I distrein another's cattle damage feasant, and before they are impounded he tenders me sufficient amends, now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of replevin against me to recover them (*p*), in which he shall recover damages for the *detention*, and not for the *caption*, because the original taking was lawful. Or if I lend a man a horse, and he afterwards refuse to restore it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by action of *detinue* (*q*),] in which [the judgment is conditional that the plaintiff recover the goods, or (if they cannot be had) their respective values, and also damages for detaining them.] But as the object is thus to obtain (if possible) specific restitution, so this action [cannot be brought for money, corn, or the like, for that cannot be known from other money or corn, unless it be in a bag or a sack, for then it may be distinguishably marked.] This form of action was also formerly subject (as were some other of our legal remedies) to the incident of *wager of law* (*vadiatio legis*),

a proceeding which consisted in the defendant's discharging himself from the claim, on his own oath, bringing with him at the same time eleven of his neighbours, to swear that they believed his denial to be true (*r*). This relic of a very antient and general institution, which we find established not only among the Saxons (*s*) and Normans (*t*), but among almost all the Northern nations that broke in upon the Roman empire (*u*), continued to subsist among us even till the last reign, when it was at length abolished by 3 & 4 Will. IV. c. 42, s. 13 (*x*); and as it exposed plaintiffs to great disadvantage, it had long had the effect of throwing the action of detinue almost entirely out of use, and introducing in its stead the action of *trover*, which still continues to be the favourite remedy in a case of unlawful detention of goods.

This action of *trover* and *conversion* is a species of trespass upon the case, and properly lies for recovery of damages against such person as has *found* another's goods and wrongfully *converted* them to his own use, from which finding and converting it derives its name. [The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods (*y*), gave it so considerable an advantage over the action of detinue, that, by a fiction of law, actions of trover were at length permitted to be brought against any man who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when de-

(*r*) 3 Bl. Com. 341.

(*s*) Ibid. 343.

(*t*) Gr. Coustumier, c. xxvi.

(*u*) 3 Bl. Com. 342, where it is observed, that its origin may be traced as far back as the Mosaical Law: "If
" a man deliver unto his neighbour
" an ass, or an ox, or a sheep, or any
" beast, to keep, and it die, or be hurt,
" or driven away, no man seeing it,
" then shall an oath of the Lord be

" between them both that he hath not
" put his hand unto his neighbour's
" goods; and the owner of it shall
" accept thereof, and he shall not
" make it good."—Exod. xxii. 10.

(*x*) An instance of it occurred in the practice of our courts as late as 1824, *King v. Williams*, 2 Barn. & Cres. 538. But in modern times such an occurrence had been extremely rare.

(*y*) *Hartford v. Jones*, Salk. 654.

[manded. The injury lies in the conversion ;] for any man may take the goods of another into possession if he finds them, but no finder is allowed to acquire a property therein as against the owner, unless at least they were designedly abandoned by him (z) ; and therefore a finder must not convert them to his own use if he knows to whom they belong. [The fact of the finding or *trover* is therefore now totally immaterial, for the plaintiff needs only to suggest (as words of form), that he lost such goods, and that the defendant found them ;] and if he proves that the goods are his property, and that the defendant converted them, it is sufficient ; and a refusal to deliver them on request, is, in itself, [*primâ facie* sufficient evidence of a conversion (a).] Under such circumstances, then, and supposing no lawful title to detain them to be shown by the defendant, the plaintiff will be entitled to judgment ; and [shall recover damages equal to the value of the thing converted, but not the thing itself, which nothing will recover but an action of detinue or replevin.] It is farther to be observed, with respect to the remedy of *trover*, that resort to it is frequently had not only in the case where goods are wrongfully detained upon a lawful taking, but where they have been unlawfully taken as well as detained. For though trespass, as we have seen, is the proper form where the action is founded on a wrongful caption, yet if the owner chooses to waive that ground of complaint, and to treat the case as one of wrongful detention only, he is at liberty to do so, and by this means enable himself to maintain an action of *trover*, which, for particular reasons of a technical kind, is sometimes found to be a more convenient form than trespass.

3. The injury of dispossessing or depriving a man altogether of personal chattels, may be effected (as already observed) by other unlawful means besides those of wrongful

(z) Vide sup. vol. ii. pp. 73, 554.

(a) 10 Rep. 56 ; *Green v. Dunn*.
3 Camp. 215 (n.) ; *Philpott v. Kel-*

ley, 3 A. & E. 106 ; *Canot v. Hughes*,
2 Bing. N. C. 448 ; *Granger v. Hill*,
5 Scott, 561.

caption or detainer; and there are various torts, or, in other words, various acts of unlawful commission or omission, which, though widely differing from each other in their specific nature, are nevertheless reducible under this common head. Thus, I may be deprived either of goods or money by delivering the goods, or giving credit for the money, to one person, in consequence of a representation made by another, as to the circumstances or character of the former, such representation being untrue, and untrue to the knowledge of the person by whom it was made; and for this injury (*b*), and for any other occasioned by a fraudulent misrepresentation (*c*), an action may be maintained of trespass on the case. But such an action is essentially founded on the fraud or deceit of the party charged; and therefore it will not lie in any case where the representation was made *bonâ fide*, however absolute and unqualified the terms in which it was expressed (*d*). And by stat. 9 Geo. IV. c. 14, s. 6, no action shall be brought to charge any person by reason of any representation concerning the character, ability or dealings of another, to the intent that such other person may obtain credit, money or goods, unless such representation be made in writing, signed by the party to be charged therewith (*e*). So, I may be deprived of the money to which I am entitled under the judgment of a court of law, in consequence of the wrongful omission of the sheriff to seize the goods or person of the defendant, under the writ of execution which I have sued out upon it; or his wrongfully permitting the defendant, after his being arrested by virtue of my writ of execution, to escape. And in these in-

(*b*) *Foster v. Charles*, 6 Bing. 396; S. C. 7 Bing. 105; *Corbett v. Brown*, 8 Bing. 35; *Polhill v. Walter*, 3 B. & Ad. 114.

(*c*) *Pewtriss v. Austen*, 6 Taunt. 522; *Humphrys v. Pratt*, 5 Bligh, N. S. 154.

(*d*) *Haycraft v. Creasy*, 2 East, 92.

(*e*) As to cases within this statute, see *Haslock v. Fergusson*, 7 Ad. & El. 86; *Swan v. Phillips*, 8 Ad. & El. 457; S. C. 1 W. W. & H. 374; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Devaux v. Steinkeller*, 6 Bing. N. C. 84.

stances, the remedy is by action on the case against the sheriff (*f*).

4. Besides the deprivation of the possession of personal property, its owner may be injured by its *abuse and damage*; [as by hunting his deer, shooting his dogs, poisoning his cattle or in anywise taking from the value of any of his chattels, or making them in a worse condition than before,] by any of those modes of negligent or wilful mischief which are too obvious to require a more particular detail. And as personal property may, in some instances, be of an intangible or incorporeal nature, as in the case of a copyright or patent right (*g*), so there are injuries relating to these matters which properly fall under the present head, such as the piracy of a literary composition, or the infringement of a patent (*h*). Of a similar description too is the injury committed by one manufacturer who sells goods under the mark of another, even though the latter should have obtained no patent, this being an invasion of his exclusive right to sell in his own name (*i*). All such torts, by way of abuse or damage of personal chattels, are redressed either by trespass, where the act is in itself immediately injurious; or by trespass on the case, where it is injurious rather in a consequential than a direct sense, according to a distinction that has been referred to in a former place (*k*). But such of these injuries as relate to intangible chattels are always remediable in the latter form of action only, and are not the proper subjects of an action of trespass. In the case of an infringement of copyright or patent right, or the like, it may also be worth remark

(*f*) *Williams v. Mostyn*, 4 Mee. & W. 144; *Guest v. Elwes*, 5 Ad. & El. 118; 5 & 6 Vict. c. 98, s. 31.

(*g*) Vide sup. vol. ii. p. 72.

(*h*) Vide as to copyright, 5 & 6 Vict. c. 45. As to patent right, 5 & 6 Will. 4, c. 83, amended by 2 & 3 Vict. c. 67; *Minter v. Williams*, 4 Ad. & El. 251; *Perry v. Skinner*, 2 Mee. &

W. 471; *Bulnois v. Mackenzie*, 4 Bing. N. C. 127; *Fisher v. Dewick*, 4 Bing. N. C. 706; *Ex parte Pering*, 4 Ad. & El. 949.

(*i*) *Sykes v. Sykes*, 3 Barn. & Cres. 541; *Blofeld v. Payne*, 4 B. & Ad. 410.

(*k*) Vide sup. p. 462.

in this place, that redress may be had not only in a court of law, but a court of equity, which will interfere by *injunction* to restrain the wrongdoer from the farther invasion of the right, and compel him to account for the profits already derived from the wrongful sale (*l*).

[Hitherto of injuries affecting the right of things personal in *possession*. We are now to consider, secondly, those which regard things in *action* only, or such rights as are founded in and arise from *contracts*, the nature and several divisions of which were explained in the preceding volume (*m*).]

Contracts, we have seen, are subject to the several distinctions of being either under seal, or by parol, verbal or written, express or implied; and they also comprise many individual species, the principal of which we had formerly occasion to consider in detail. Their violation in any instance constitutes that general description of injury known by the name of *breach of contract*; and in general the remedy, where the contract is under seal, is by action of debt or covenant; when it is not under seal, by debt or by a particular species of trespass on the case, called *assumpsit*; and this, whether such parol or unsealed contract be written or verbal, express or implied. It is also to be understood, that in every case the competency of the several actions above specified depends not merely upon the nature of the contract, as being under seal or not, but upon the nature of the claim, as amounting to a *debt* or not, according to a distinction before laid down when treating of actions in general; but that the case is, on the other hand, often such as to give the plaintiff his election between one form of action and another. It may be here expedient, however, to advert in detail to some particular

(*l*) *Hill v. Thompson*, 3 Meriv. 622; *Collard v. Alison*, 4 Myl. & C. 487; *Southey v. Sherwood*, 2 Meriv. 440; *Barfield v. Nicholson*, 2 Sim. &

Stu. 1; *Bailey v. Taylor*, 1 Russ. & Mylne, 73; 5 & 6 Vict. c. 45, s. 24.

(*m*) Vide sup. vol. ii. p. 108.

contracts, consisting principally of those which, from their superior frequency or importance, have attracted our specific notice in former parts of the work (*n*). The remedies in these particular cases may be stated as follows:—

1. As regards the breach of *covenants in leases*(*o*) (for example, the covenant to repair on the part of the tenant, or that for quiet enjoyment on the part of the landlord), the remedy for either party is by action of covenant, which is also the proper form in case of the breach of any of these *covenants relating to title* that are ordinarily contained in conveyances of real estate. But in case of a covenant in a lease to *pay rent*, the breach of it may be redressed either by action of covenant or of debt; for in this case the landlord, having a claim to a liquidated sum of money, there arises between him and the tenant a debt in point of law(*p*); which debt he may demand if he thinks proper, in lieu of the more general claim for damages in respect of the breach of covenant. [For a freehold rent indeed, reserved on a lease for life, &c., no action of debt lay by the common law during the continuance of the freehold out of which it issued;] the proper remedy in that case having been by actions real; and it seems that to this day no rent of inheritance is recoverable by an action of debt(*q*); but by the statutes 8 Anne, c. 14, and 5 Geo. III. c. 17, such action may now be brought to recover freehold rents reserved on lease for life(*r*). Also debt will not lie for arrears of a rent-charge, or an annuity granted in fee, in tail, or for life, during the continuance of such estate(*s*), but the proper remedy is by covenant or

(*n*) Vide sup. vol. i. p. 455; vol. ii. pp. 120, 186.

(*o*) Vide sup. vol. i. p. 455.

(*p*) Vide sup. vol. ii. p. 186.

(*q*) *Webb v. Jiggs*, 4 Man. & Sel. 113.

(*r*) These statutes are referred to by Blackstone as if they applied to rents of inheritance also, [but they are

confined to rents reserved on lease for life. As to the remedies for the executors of tenants in fee simple or fee tail, for arrears in his lifetime, see 32 Hen. 8, c. 37, s. 1.

(*s*) *Kelly v. Clubbe*, 3 Brod. & Bing. 130; Bac. Ab. Annuity and Rentcharge.

by another action, that has now fallen into disuse, called an action of annuity (*t*). On the other hand, where rent falls into arrear under a parol contract, no action of covenant can be maintained; that form being exclusively applicable to sealed contracts, but debt will lie; and by the statute 11 Geo. II. c. 19, s. 14, the plaintiff may also resort (though he could not by the common law (*u*), to the action of assumpsit just mentioned; which is an action on the case, appropriate to the injury committed by the breach of a parol promise, and from thence derives its name. And the particular form of it adopted in this instance is that variety called *indebitatus assumpsit*, an action applicable to the case where a *debt* exists between the parties, and where the defendant is charged upon his promise (which may be either express or implied) to pay the amount. And here it may be proper to remark, that whenever debt lies upon a parol contract, *indebitatus assumpsit* will also lie, as an alternative remedy; though neither this nor any other kind of *assumpsit* can be maintained upon a contract by deed.

2. Under a contract of *sale* of goods (*x*), if the vendee complains of a non-delivery of the article sold, a breach of warranty, or the like, his remedy, where the contract was by parol only (as is usually the case) and not by deed, is by the action of assumpsit; and if the vendor complains of non-payment of the price, there being in this case a *debt* between the parties, the remedy is by debt or *indebitatus assumpsit*, at the option of the plaintiff.

3. Where upon a contract of *bailment* (*y*), the bailor complains of a failure to redeliver the article, the defendant may in general be charged as on a tort or a contract. In the former course of proceeding, the action may be *detinue*, or *trover*, or (according to the circumstances) an action on the case for negligence; in the latter, supposing

(*t*) Bac. Ab. Annuity and Rent-charge. 2 H. Bl. 323.

(*x*) Vide vol. ii. p. 120.

(*u*) Brett v. Read, Cro. Car. 343;

(*y*) Vide vol. ii. p. 129.

1 Rol. Ab. 7, l. 23; Naish v. Tatlock,

the contract to be (as it usually is) by parol, the form of action is *assumpsit*.

4. Where upon a *loan of money* (*z*), the amount is not repaid according to the contract, and arrears exist either on account of principal or interest, the action for this injury, if the contract be under seal, is *debt or covenant*; if it be not under seal, then *debt or indebitatus assumpsit*. And here we may take the opportunity of remarking that there are other forms of pecuniary claims closely connected with that for *money lent*, viz. the claim for *money paid* by the plaintiff for the use of the defendant, for *money had and received* by the defendant to the use of the plaintiff, and for money which the defendant is found to owe to the plaintiff upon an *account stated* between them (*a*). Indeed, it is often difficult to determine, upon a given state of facts, into which of these forms the plaintiff's demand properly resolves itself. Each of them, however, is the proper subject for an action of *debt or indebitatus assumpsit*.

5. As to the contract of *partnership* (*b*), we have before had occasion to remark (*c*), that questions of account between partners generally fall under the jurisdiction of a court of equity, and (except in a form of action called *account*, which has now fallen into disuse) are not cognizable in a court of law (*d*). But an action at law may be brought by one partner against the other, on an express agreement to do or forbear from some particular act not involving any question of account (*e*); or to pay a liquidated balance, or the like (*f*); the remedy in such cases being

(*z*) Vide vol. ii. p. 136.

(*a*) This action upon an *account stated* lies only where the plaintiff and defendant have come to an account, and a balance has been acknowledged; though the simple acknowledgment that a particular sum is due will, without any farther accounting, be sufficient. If the account is an open one, the remedy at law is by action of *account*, vide sup. vol. ii. p. 154, n. (*t*),

but the only usual remedy is by bill in equity.

(*b*) Vide vol. ii. p. 150.

(*c*) Vide vol. ii. p. 154.

(*d*) *Holmes v. Higgins*, 1 Barn. & Cres. 74; Arch. Pl. 36, 37.

(*e*) *Bedford v. Button*, 1 Bing. N. C. 391.

(*f*) *Chit. Cont.* 238; *Smith v. Barrow*, 2 T. R. 476.

debt, assumpsit, or indebitatus assumpsit, according to the nature of the case, and the distinctions formerly laid down in regard to those several forms of action. So, one partner cannot sue the other at law, for taking a chattel of the partnership away into his own exclusive use; but if one of the partners has destroyed a chattel belonging to the firm, it seems that the other may maintain an action of trespass (*g*).

6. The breach of a contract of *guarantee* (*h*), if contained in an instrument under seal, is redressed by action of debt or covenant; if the contract be not under seal, then by action of debt or assumpsit. The remedy by the surety against the principal, where the former has been compelled to make a payment under the guarantee, is by debt or indebitatus assumpsit, as for money paid by the former to the use of the latter; and any one of several sureties, who has paid more than his rateable proportion, is entitled to claim contribution from the others, in the same forms of action.

7. Upon *bonds* (*i*) the remedy of the obligee, in case of breach of contract by the obligor, is by action of debt only, which is always brought as for the amount of the penalty; but according to the course of practice, as explained in a former part of the work (*k*), the plaintiff is allowed to recover no more upon a bond conditioned for the payment of money, than the principal sum due, with interest and costs; nor (generally) upon a bond conditioned for the performance of any other act, more than a jury shall assess by way of damages. The rule is similar with respect to all other contracts secured by penalties, if the plaintiff elects to proceed as for the penal sum; but the form of such contracts in general is such as to give him an option of claiming damages, without regard to the penal stipulation; and if the claim be made in this shape, the form of the action is debt, covenant, or

(*g*) Co. Litt. 200 a, b; B. N. P. 34; Arch. Pl. 36; vide Martyn v. Knowllys, 8 T. R. 145.

(*h*) Vide vol. ii. p. 154.

(*i*) Vide vol. ii. p. 157.

(*k*) Vide vol. ii. p. 159.

assumpsit, according to distinctions already more than once explained.

8. For breach of contract on a *bill of exchange* or *promissory note* (*l*), the remedy is either by assumpsit or debt, but with this difference, that assumpsit will lie in all cases; the particular form of it called *indebitatus assumpsit*, or debt, only where there was a privity of contract between the parties to the suit. Thus the payee or any indorsee of a bill or note may maintain assumpsit against the maker; but debt, or *indebitatus assumpsit*, can be maintained against him only by the payee. So assumpsit lies against the acceptor of a bill, at the suit of an indorsee, or of the payee, or of a drawer, who has been compelled to take it up, but debt or *indebitatus assumpsit* will not lie against him at the suit of any of these parties, except the drawer (*m*).

9. Upon a *policy of marine or fire insurance* (*n*), the remedy of the assured, in case of breach of contract by the insurer, is by covenant, where the policy is under seal; by assumpsit where it is not. On a policy of *life insurance* under seal, the remedy is by debt or covenant; on one not under seal, debt or *indebitatus assumpsit*.

10. And lastly, upon *charter parties* (*o*), the form of remedy, in case of breach of contract, is governed by the same distinction, with respect to the nature of the instrument, as being sealed or unsealed. In the former case, if the action be brought by the charterer against the owner for not receiving, or properly stowing or delivering the cargo, the form is covenant; if by the owner against the charterer for not supplying a full cargo, it is also covenant; but if for non-payment of freight, it may be either covenant

(*l*) Vide vol. ii. p. 162.

(*m*) *Priddy v. Henbery*, 1 Barn. & Cres. 674, and the authorities there cited; *Cresswell v. Crisp*, 2 Dowl. 635; *Kinahan v. Palmer*, 2 Jones, Exch. Rep. Ireland; *Hatch v. Traves*, 11 Ad. & Ell. 702; *Cloves v. Williams*, 3 Bing. N. C. 868. It was at one time

doubted whether debt or *indebitatus assumpsit* would lie in any case on a bill or note, unless expressed to be *for value received*. But it is now held that the omission of these words is not material in that respect.

(*n*) Vide vol. ii. p. 172.

(*o*) Vide vol. ii. p. 184.

or debt, at the option of the plaintiff. On the other hand, where the charter party is not under seal, *assumpsit* must be substituted for covenant in all the before mentioned cases: and for non-payment of freight the form of action is *assumpsit* (in the *indebitatus* form or otherwise), or, at the option of the plaintiff, may be debt.

We have now sufficiently considered the injuries which affect such things in action as arise out of contracts, but there are some things in action which cannot properly be said to have that origin, and the withholding of which will nevertheless constitute a wrong or injury, viz. such debts as result from the obligation to pay money pursuant to a sentence of the law, or an enactment of the legislature; as when in a court of law, judgment is obtained by one man against another, for a specific sum of money; or when by an act of parliament, of that class called penal statutes, a pecuniary forfeiture is inflicted for committing some specified offence, and such forfeiture is made recoverable, as it usually is, by the crown, or the party aggrieved, or a common informer, as the case may be. This obligation or liability to pay a specific sum of money constitutes (as will appear by former explanations) a *debt*, so that the party against whom the judgment is obtained is immediately considered as owing to his adversary the amount awarded, and the party who transgresses the penal statute as immediately owing to the crown, the party aggrieved, or the common informer, as the case may be, the amount of the penalty (*p*). The remedy for the recovery of such debt, or chose in action, when withheld, is by ac-

(*p*) Blackstone considers the debt in such cases as growing out of an implied contract, viz. the original contract entered into by all mankind who partake the benefits of society, to submit to the constitution of the state of which they are members. 3 Bl. Com. 160. But though this seems correctly laid by him and other jurists as the

foundation of the general obligation to obey the law, there is perhaps an unnecessary subtlety in supposing it the basis of the kind of debts in question. It is more natural to consider such debts as not founded upon any contract at all;—though an implied contract to pay may doubtless be engrafted upon them.

tion of debt on the judgment, or on the penal statute respectively; and in the latter case this remedy is generally designated as a penal action, or, where one part of the forfeiture is given to the crown, and the other part to the informer, a *popular* or *qui tam* action, because it is brought by a person *qui tam pro domino rege quam pro se ipso sequitur*.

IV. With regard to injuries which affect the rights of a man in his *private relations*, [and in particular such as may be done to persons under the four following relations, husband and wife, parent and child, guardian and ward, master and servant.]

1. The injuries that may be offered to a man, considered as a *husband*, are principally three; [*abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating*, or otherwise abusing her.]

And first, [*abduction* may be either by fraud and persuasion, or open violence; though the law, in both cases, supposes force and constraint, the wife having no power to consent, and therefore gives a remedy by action of trespass *vi et armis*, *de uxore rapta et abducta* (*f*). This action lay at the common law; and thereby the husband shall recover, not the possession of his wife (*g*), but damages for taking her away; and by statute Westminster 1, 3 Edw. I. c. 13, the offender shall also be imprisoned two years, and be fined at the pleasure of the crown. Both the crown and the husband may therefore have this action (*h*); and the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause (*i*). The old law was so strict on this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted, and in danger of being

(*f*) F. N. B. 89.

(*g*) 2 Inst. 434.

(*h*) 4 Inst. 434.

(*i*) B. N. P. 78.

[lost or drowned (*k*); but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce (*l*).

Adultery, though it is a public crime, left by our laws to the coercion of the spiritual courts, yet, considered as a civil injury, (and surely there can be no greater,) the law gives a satisfaction to the husband for it by an action of trespass *vi et armis*,] (or on the case, at his election) (*m*), [against the adulterer, wherein the damage recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances (*n*), as the rank and fortune of the plaintiff and defendant, the relation or connection between them,] the degree and nature of the seduction employed, the previous behaviour and character of the wife, the manner in which she had been previously treated by the husband, [and the husband's obligation, by settlement or otherwise, to provide for those children which he cannot but suspect to be spurious.] The damages will also be mitigated where the husband is proved to have been himself first guilty of conjugal infidelity (*o*); and if it appear that he connived at or consented to his own dishonour, or lived at the time of the adultery in a state of absolute and permanent separation from his wife, the action will be wholly barred (*p*). It is also to be remarked, that in actions of this kind, as well as in indictments for polygamy, [a marriage in fact must be proved,—though generally, in other cases, reputation and cohabitation are sufficient evidence of marriage (*q*).

For the injury of *beating* a man's wife, or otherwise ill-using her, [if it be a common assault, battery, or im-

(*k*) Bro. Ab. tit. Trespass, 213.

(*l*) Ibid. 207, 440.

(*m*) Cook v. Sayer, 2 Ld. Ken. 371; Mac Fadden v. Olivant, 6 East, 387; Chamberlain v. Hazlewood, 5 Mee. & W. 515.

(*n*) B. N. P. 26.

(*o*) Bromley v. Wallace, 4 Esp. 237.

(*p*) Bennett v. Allcott, 2 T. R. 168; Duberley v. Gunning, 4 T. R. 655; Weedon v. Timbrell, 5 T. R. 357; Chambers v. Caulfield, 6 East, 244.

(*q*) Morris v. Miller, Burr. 2057.

[prisonment, the law gives the usual remedy to recover damages by action of trespass *vi et armis*, which must be brought in the names of the husband and wife *jointly*; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy, by an action of trespass, for this ill usage,] with an allegation, by way of special damage, that he has lost the benefit of her society, called an allegation *per quod consortium amisit*, [in which he shall recover a satisfaction in damages (*r*).]

2. With respect to the injury capable of being done to a man in the relation of *parent*, we may remark, that one instance of a wrong of this description formerly existed in the case of [marrying the son and heir without the father's consent, whereby, during the continuance of the military tenures, he lost the value of his marriage. But this injury has now ceased, together with the right upon which it was grounded.] And it is now held that there is no instance in which an injury can be sustained by a parent in his mere parental character; and that in the case of a battery or other ill-treatment inflicted on a child, the action for redress must in general be brought in the name of the child himself, whether he have attained to his full age or not(*s*). There are cases, indeed, in which the parent is entitled to sue in respect of misconduct towards the child, but as the right of suit attaches to him in all such instances, in the capacity of master, and not strictly in that of parent, the consideration of them will belong more properly to a subsequent head.

3. An injury may be done to a man in the relation of

(*r*) *Guy v. Livesey*, Cro. Jac. 501; *Hyde v. Seyssor*, *ibid.* 538. As to the case where, by negligence of the defendant, the plaintiff's wife is *killed*, vide *Baker v. Bolton*, 1 Camp. 493.

(*s*) *Hall v. Hollander*, 4 Barn. & Cres. 660. This case may be con-

sidered as overruling the opinion to which Blackstone inclined, (see 3 Bl. Com. 141,) that an action may be maintained by a father for the abduction of his child, as well as by a husband for that of his wife.

guardian, by stealing or ravishing away his ward. For [though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in *socage* was always (*t*), and is still, entitled to an action of ravishment,] in the form of trespass, [if his ward or pupil be taken from him; but then he must account to his pupil for the damages which he so recovers (*u*).] But a more speedy and summary method of redressing all complaints relative to wards and guardians, [hath of late obtained, by an application to the Court of Chancery, which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II., c. 24, that testamentary guardians may maintain an action of ravishment or trespass for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants (*x*).

4. To the relation between *master and servant*, and the rights accruing therefrom, there are several species of injuries incident. One is retaining a man's hired servant before his time is expired,] which, [as it is an ungentlemanlike, so it is also an illegal act, for every master has by his contract, purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master, and for that injury the law has given him a remedy by action on the case; and he may also have an action against the servant for the non-performance of his agreement (*y*). But if the new master was not apprised of the former contract, no action lies against *him* (*z*), unless he refuses to restore the servant upon demand. Another point of injury] is that of [beating, confining, or disabling a man's

(*t*) F. N. B. 139.

(*u*) Hale on F. N. B. 139.

(*x*) Eyre v. Countess of Shaftesbury, 2 P. Wms. 108.

(*y*) F. N. B. 167; Keane v. Boycott, 2 H. Bl. 511; Gunter v. Astor,

4 Moore, 12.

(*z*) Ibid. Winch. 51.

[servant,] so that he is not able to perform his work, [which depends upon the same principle as the last, viz. the property which the master has, by his contract, acquired in the labour of his servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself, as an individual, may have against the aggressor, the master also, as a recompence for *his* immediate loss, may maintain an action of trespass *vi et armis*,] or, at his election, trespass on the case (*a*), [in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (*b*); and then the jury will make him a proportionable pecuniary satisfaction (*c*).] It is in this manner and in this alone, that by our law a parent is enabled to claim redress for a battery, or other ill usage inflicted on his child, or even for the seduction of his daughter, viz. as a master, and in an action of trespass (or on the case), *per quod servitium amisit*; and, therefore, unless he is able to prove that his child was in his service at the time the injury was committed, he is without remedy (*d*); from which it follows that he is without remedy when the child resided at the time with another master, though that master may himself maintain an action (*e*). But where a parent is plaintiff in a case of seduction, the courts incline to relieve him as much as possible from any difficulty connected with proof of the loss of service, considering the action as brought *in substance* to repair the outrage done to parental feeling,—and hold, therefore, that in such an action, the mere residence of the child with him at the time affords sufficient proof that the relation of master and servant

(*a*) *Chamberlain v. Hazlewood*, 5 Mee. & W. 515.

(*b*) 9 Rep. 113; 10 Rep. 130.

(*c*) Blackstone remarks that a similar practice prevailed among the Athenians, where masters were entitled to an action against such as beat or ill-

treated their servants, and cites *Potter's Antiq.* l. i. c. 26.

(*d*) *Hall v. Hollander*, 4 Barn. & Cres. 660; *Blaymire v. Hayley*, 6 Mee. & W. 55.

(*e*) *Irving v. Dearman*, 11 East, 24.

existed between them (*f*). Upon the same principle, too, the jury is directed, in assessing the damages, to take into account the dishonour done to the plaintiff, as well as the loss of service (*g*); though, on the other hand, they are also bound (as in the case of adultery) to pay attention to all such circumstances connected with the behaviour of any of the parties, as tend to lessen the merits of the plaintiff's case. It is farther to be remarked, with respect to an action for seduction, that none can be maintained in any case by the daughter herself—for *volenti non fit injuria*.

Such then is the state of the law (briefly considered) with respect to injuries resulting from the violation of rights in private relations,—as to which it may be observed in general, [notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior, by such injuries, is totally unregarded. One reason for which may be this—that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in any thing during her coverture (*h*). The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture (*i*).] And so [the servant, whose master is disabled, does not thereby lose

(*f*) Jones v. Brown, 1 Esp. 217.

(*g*) Stark. Ev. part iv. p. 1309.

(*h*) Vide sup. vol. ii. p. 302.

(*i*) Blackstone remarks here, that the wife or child had, nevertheless, if the husband or parent were slain, a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction, and called an *ap-*

peal. This proceeding, though long since antiquated, was still in force when Blackstone wrote, and was strangely revived in our own days, in the case of Ashford v. Thornton, 1 Barn. & Ald. 405. It was soon afterwards, however, abolished by statute 59 Geo. 3, c. 46.

[his maintenance or wages.] He has no interest in his master personally considered. [If he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action for any battery or imprisonment which such master may happen to endure.]

V. The only injuries that remain to be noticed are those sustained by a man in respect of his *public* rights. This subject, however, will not detain us long, for injuries of this description between subject and subject are in general of such a nature as to be remediable not so much by action as by indictment, or by some of the prerogative writs, to which we shall have occasion to advert in a subsequent chapter. Yet there are various instances in which an action may be mentioned in respect of the violation of public rights, as where a special damage is sustained by an individual in consequence of the obstruction of a highway (*k*), or where the returning officer at a parliamentary election refuses to receive the vote of an individual, so that the election takes place without his being allowed to exercise his elective right; in both which instances the remedy is by action on the case. In the latter of these instances, the matter was originally held to be actionable, not without great difficulty; it being urged on the other side, that the offence was a parliamentary one, and not properly cognizable out of parliament, and also that it involved no private injury that the law could notice; yet it was ultimately adjudged (*l*), that an action lay in this case at common law, for that the law gave a remedy for every injury, and that by this act of the returning officer the plaintiff was deprived of the greatest privilege of a subject, viz. that of consenting to the laws by which he is bound, and that the concurrent jurisdiction of parliament in the matter created no difficulty, particularly as the very grievance, which was the subject of complaint, was that the plaintiff was not properly represented there. A somewhat similar

(*k*) *Ashby v. White*, *Ld. Raym.* 938.

(*l*) *Ibid.*

description of injury has been since provided for, by a positive enactment of the legislature; for by 4 & 5 Vict. c. 58, s. 95, “if any sheriff or other returning officer shall
“wilfully delay, neglect or refuse duly to return any person who ought to be returned to serve in parliament,
“such person may, in case his right shall have been established by the decision of a select committee, sue the
“officer in any of her Majesty’s courts of record at Westminster, and recover double the damages he shall sustain by reason thereof, together with full costs of suit,
“provided such action is commenced within one year
“after the commission of the wrongful act, or within six
“months after the conclusion of any proceedings in the
“House of Commons relative to such election.”

CHAPTER IX.

OF THE LIMITATION OF ACTIONS.



WE have now considered the various injuries between one subject of the realm and another, of which the courts of common law take notice, and the general nature of the remedies provided in these courts by way of action. When any of these injuries have been committed, it follows that a right of action has arisen; but after ascertaining this, there still remains another point for consideration before an action can be safely brought, viz. how long the right of action has existed,—there being established by certain statutes called the *Statutes of Limitation*, with respect to almost all actions and other legal proceedings, a certain period, after which the remedy is barred by the mere effect of lapse of time.

[The use of these Statutes of Limitation is to preserve the peace of the kingdom, and to prevent those innumerable perjuries which might ensue if a man were allowed to bring an action for an injury committed at any distance of time. Upon both these accounts the law therefore holds, that *interest reipublicæ ut sit finis litium*; and upon the same principle, the Athenian laws in general prohibited all actions where the injury was committed five years before the complaint was made (a).] Nor are these the only reasons on which the bar by lapse of time is founded; for if the plaintiff were permitted to bring a claim forward at any period, however remote, there would be danger of its being delayed until the defendant had, by some casualty, been deprived of the documentary or other

(a) 3 Bl. Com. 307, 308.

evidence by which it might once have been successfully encountered; and the delay might even be practised with the fraudulent design of exposing him to this disadvantage: besides which, it is to be considered that great hardship always attaches to the case of a party who after a long possession, not originating in any fraud or other misconduct of his own, finds himself unexpectedly liable to eviction; while, on the other hand, a supine claimant is entitled to no favour or protection from the law; the maxim being, that *vigilantibus, non dormientibus, jura subveniunt*.

The course of legislation upon the subject under consideration has been such as to lead naturally to its division into two branches; the one consisting of those provisions which relate to actions brought for recovery of things real; the other, of those which relate to actions brought with any different object.

I. And, first, with respect to actions brought for recovery of land or other things real.

It was in reference to real actions, while still the only form of remedy for recovery of the realty, that the law of limitations was first established. And originally such actions were limited from some particular event or fixed era. Thus, by the antient law in the time of Hen. II., the demandant, in a writ of right, could not claim upon any seisin earlier than the reign of Hen. I. (b); nor by the Statute of Merton, 20 Hen. III. c. 8, earlier than the reign of Hen. II.; nor by Statute Westm. 1, 3 Edw. I. c. 39, earlier than that of Rich. I. And the same kind of limitation, though from more recent dates, was by the same statutes from time to time appointed for many other kinds of real action. But these dates were allowed afterwards to continue so long unaltered, that in process of time they became in effect no limitation at all; which gave rise at length to the Statute of Limitation, 32 Hen.

(b) Com. Dig. Temps (G.)

VIII. c. 2; which took a different course, by limiting real actions not from any fixed date or event, but according to a fixed interval of antecedent time, and provided, that where in any writ of right, or any action possessory, the demandant claimed upon his own seisin, it must be a seisin within thirty years back, where on the seisin of his ancestor, it must (in a writ of right) be a seisin within sixty, or (in a possessory action) within fifty years (c). And afterwards, by 21 Jac. I. c. 16, it was enacted, that all writs of formedon should be brought within twenty years after the cause of action first fallen, and also that no person should make *entry* into any lands or hereditaments, but within twenty years after his right should first accrue; from which last enactment it followed, that the same period of twenty years also became the limitation in every action of ejectment, [for no ejectment can be brought unless where the lessor of the plaintiff is entitled to enter on the lands (d).]

And thus stood the doctrine of limitation in general, so far as relates to the recovery of real property, during the whole of the long period that elapsed from the reign of Hen. VIII. to that of Will. IV.; upon which branch of the law, however, it may be proper for the farther information of the student, to make some additional remarks. First, then, it may be observed, that there originally existed no provision that was applicable to *claims by the crown*, for the maxim formerly was, that *nullum tempus occurrit regi*, and the statute of Hen. VIII. was not so framed as to bind the crown's rights. [By the statute, indeed, of 21 Jac. I. c. 2, a time of limitation was extended to the case of the king, viz. sixty years precedent to 19th February, 1623 (e);]

(c) 3 Bl. Com. 189, (n.) This statute extended to *rents, suits and services*, as well as other hereditaments, but only to those which were customary or prescriptive, and not to those created by deed, or reserved on a particular estate. 3 Bl. Com. 189.

Nor did it extend to services of a casual kind, such as by possibility might not become due within the period of limitation, such as fealty. Com. Dig. Temps. G. 9.

(d) 3 Bl. Com. 307.

(e) 3 Inst. 189.

but this of course became ultimately ineffectual by reason of the gradual efflux of time. It was however at length provided, by 9 Geo. III. c. 16, that in suits relating to land, the crown should be bound by the lapse of sixty years, by which latter statute the law relating to this subject is still governed (*f*). Secondly, we may remark, that even up to the reign of Will. IV. there existed [no limitation with regard to the time within which any actions touching *advowsons* are to be brought, at least none later than the times of Rich. I. and Hen. III.; for by statute 1 Mar. st. 2, c. 5 (*g*), the statute of limitations, 32 Hen. VIII. c. 2, was declared not to extend to any writ of right of advowson, *quare impedit*, or a writ of dower presentment or *jure patronatus* (*h*).] And this because [it may very easily happen, that the title to an advowson may not come in question, nor the right have an opportunity to be tried within sixty years, which was the longest period of limitation assigned by the statute of Hen. VIII. For Sir E. Coke tells us (*i*), that there was a parson of one of his churches that had been incumbent there above fifty years; nor are instances wanting wherein two successive incumbents have continued for upwards of a hundred years (*j*). Had therefore the last of these incumbents been the clerk of an usurper, or been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in order to have shown a clear title and seisin by presentation and admission of the prior incumbent.] But though for these reasons it was deemed im-

(*f*) See also 21 Jac. 1, c. 14, making some regulations as to informations of intrusion, where the crown has been out of possession twenty years. *Doe v. Morris*, 2 Scott, 276. See as to 9 Geo. 3, c. 16, *Goodtitle d. Parker v. Baldwin*, 11 East, 493.

(*g*) Et vide 7 Ann. c. 18, allowing *quare impedit*, &c. to be brought upon

any prior presentation, however distant.

(*h*) 3 Bl. Com. 250.

(*i*) 1 Inst. 115.

(*j*) Two successive incumbents of the rectory of Chelsford cum Farnborough, in Kent, continued 101 years, of whom the former was admitted in 1650, the latter in 1700 and died in 1751.

proper to introduce a limitation with respect to this species of property, founded merely on the lapse of time, yet it occurred to Blackstone, in treating of this subject, to remark, that it might be expedient to introduce one compounded of the length of time and the number of avoidances together; a suggestion that we shall presently find to have been since carried into effect.

The state of the law of limitation above described having fallen under the consideration of the commissioners appointed in the last reign for revision of the law relative to real property in general, they took occasion in their reports to recommend various improvements on this subject, which were afterwards embodied into the act of parliament, 3 & 4 Will. IV. c. 27, and which were founded on the general principle that twenty years is an allowance of time reasonably sufficient in every case for the recovery of corporeal hereditaments, provided the claimant be a merely private person, and labouring under no disability to assert his pretensions. This statute, which now governs the law of limitation in all proceedings for recovery of things real, whether in law or equity (to which the crown is not a party), and which extends also to proceedings for the recovery of money secured or charged on the realty, or of any legacy, comprises a body of enactments too numerous and diversified to be capable of full detail in a work like the present. A selection shall be made of such as are of cardinal character.

And here we may notice, at the outset, that part of the statute (i), to which we have more than once had occasion in the course of this volume to refer, viz. the abolition of real actions (with the exception of the writ of right of dower, dower, and *quare impedit*), so as to leave to parties deprived of land no remedy in general but those of entry or ejectment. As in this class of actions suitors were allowed to bring forward claims referable to periods so remote as thirty, fifty, or even sixty years, they could not have been

retained without alteration consistently with the principle on which, as above remarked, the act is founded ; and as they were open to additional objection from their dilatory character, and the technical difficulties with which they were surrounded, there appeared no doubt upon the whole as to the expediency of their extirpation.

But besides this measure, which must rather be considered as auxiliary to the new system of limitation than as strictly forming a part of it, the statute contains a copious and elaborate development of that system, from which we shall extract the following provisions :

1. That (subject only to some temporary exceptions) no person (*j*) shall, after the 31st Dec. 1833, make an entry or distress, or bring an action to recover any land (*k*) or rent (*l*), but within twenty years next after the time at which the right to make such entry or distress, or bring such action, shall first accrue (*m*), either to the person himself, or those through whom he claims (*n*), as the case may be (*o*). This is subject, however, to qualification (as

(*j*) " Person" is defined by sect. 1 as extending to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual.

(*k*) " Land" is defined by the same section to extend to all corporeal hereditaments, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), whether freehold or copyhold.

(*l*) " Rent" is defined by the same section to extend to all heriots, services and suits, for which distress may be made, and to all annuities and periodical sums of money charged on land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.

(*m*) The statute defines with great care the time at which the right shall be considered as *first accruing* in all

the different cases that may arise. As to the effect of this statute upon the former doctrine relative to adverse possession as applied to the subject of limitations, see *Nepean v. Doe*, 2 M. & W. 894 ; *Culley v. Doe d. Taylorson*, 11 Ad. & E. 1008.

(*n*) This is defined by sect. 1 to mean any person by, through or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed as heir, issue in tail, tenant by the curtesy, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which he, or some person through whom he claims, became entitled as lord by escheat.

(*o*) Sect. 2.

justice evidently required) in the case of persons under *disability*, it being provided that if, at the time at which the right of any person shall first accrue, such person shall be under the disability of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then he, or the person claiming through him, may, though twenty years have expired, make the entry or distress, or bring the action within ten years next after the person to whom the right accrued shall have ceased to be under any such disability, or die, whichever shall first happen (*p*); but that no such entry, distress, or action, shall be made or brought in such case of disability, but within forty years next after the right accrues, although the person to whom it accrued may have remained under disability the whole of the forty years, or although the said term of ten years above mentioned shall not have expired (*q*).

2. That after the same 31st December, 1833, no person claiming any land or rent in *equity* shall bring any suit to recover the same but within the same period during which, by virtue of the provisions of the act, he might have made an entry or distress, or brought an action for recovery thereof, if his estate had been legal instead of equitable (*r*). This is subject, however, to the following provisions:—*First*, That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him (*s*). *Secondly*, That in every case of a concealed fraud, the right of any person to bring a suit

(*p*) Sect. 16.

(*q*) Sect. 17.

(*r*) Sect. 24.

(*s*) Sect. 25.

in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time when such fraud shall, or, with reasonable diligence, might have been first known or discovered, but not so as to enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know, and had no reason to believe, that any such fraud had been committed (*t*). *Thirdly*, That nothing in the act contained shall interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may *not* be barred by virtue of that act (*u*). *Fourthly*, That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor, or person, in writing, signed by the mortgagee, or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after such acknowledgment, or the last of such acknowledgments, if more than one was given (*v*).

(*t*) Sect. 26.

(*u*) Sect. 27.

(*v*) Sect. 28, which also contains provisions as to the case of there being more mortgagors or mortgagees than one, and the effect of acknowledgments

to or by one of them. We may notice here that by a subsequent act, 7 Will. 4 & 1 Vict. c. 28, (reciting that doubts had occurred as to the meaning of the act in question as to the limitation in case of *mortgages*,) it is de-

3. That after the same 31st December, 1833, no entry, distress, action or suit to recover any land or rent, shall be made or brought by any spiritual or eleemosynary corporation sole, after the determination of such period as hereinafter mentioned next after the time at which the right of such corporation sole or his predecessor, to make or bring the same, shall first accrue, viz. the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if not, then during such farther number of years as will make up the sixty years (*x*).

4. That after the same 31st December, 1833, no person shall bring any *quare impedit*, or other action or suit, to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, after the expiration of such period as hereinafter mentioned, viz. the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if not, then after the expiration of such farther time as will make up the sixty years (*y*).

5. That after the same 31st December, 1833, no person shall bring any *quare impedit*, or other action or suit, to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of 100 years from the time at which a clerk shall have obtained possession of such

clared that it shall be lawful for any person claiming under a mortgage of land to make an entry or bring an action at law or suit in equity, to recover it, at any time within twenty years from the last payment on account of principal or interest, though more than

twenty years from the time the right first accrued.

(*x*) Sect. 29.

(*y*) Sect. 30. This also applies to the case where the *bishop* is the patron. 6 & 7 Vict. c. 54, s. 3.

benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title; unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right, held or derived under the same title (z).

6. That after the same 31st December, 1833, no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or made payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same, unless in the meantime some part of the principal or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, suit or other proceeding, shall be brought but within twenty years after the last of such payments or acknowledgments (a).

7. That after the same 31st December, 1833, no arrears of dower, or damages on account of such arrears, shall be recovered by any action or suit for a longer period than six years next before the commencement of such action or suit (b).

8. That after the same 31st December, 1833, no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such

arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent; provided nevertheless, that where any prior mortgagee, or other incumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years (c).

9. That after the same 31st December, 1833, no person claiming any tithes, legacy or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any *spiritual court* to recover the same, but within the period during which he might bring such action or suit, at law or in equity (d).

II. With respect to actions not brought for recovery of things real.

1. A period of limitation with respect to most of these is fixed by 21 Jac. I. c. 16 (e), which provides in substance that all actions of trespass for injuries to the person or to land, or personal property (except those hereinafter particularized), detinue, trover, replevin, account (except upon

(c) Sect. 42.

(d) Sect. 43.

(e) As to time from which this statute begins to run in particular cases, see *Collinge v. Heywood*, 9 Ad. &

El. 633; *Rhodes v. Smethurst*, 4 M. & W. 42; S. C. (in error), 6 M. & W. 351; *Waters v. Earl of Thanet*, 2 Ad. & El. N. S. 757; *Howell v. Young*, 5 B. & C. 259.

accounts between merchants (*f*)), trespass on the case (except for verbal slander), or debt or simple contract, or for arrears of rent, shall be limited to six years after the cause of action accrued; actions of trespass for assault, menace, battery, wounding and imprisonment, to four years; and actions on the case for verbal slander to two years. But here also, as in the statute of Will. IV., exception is made in favour of persons labouring under *disability*. For, first, if any person *entitled to sue* shall, at the time when the cause of action accrued, be an infant or a feme covert, or be *non compos*, imprisoned (*g*), or beyond the seas, it is provided by the statute now under consideration that such person shall be at liberty to sue within the same period after the removal of the disability as is allowed to persons having no such impediment. And by 4 Ann. c. 16, s. 19, if any person *liable to be sued* shall at the time when the cause of action accrued be beyond the seas, a similar extension of the time for bringing the action shall in that case also be permitted.

The operation of the statute of 21 Jac. I. c. 16, with respect to actions upon *simple contract*, was at one time considerably weakened by the doctrine which prevailed, that not only a payment on account of principal or interest, but any mere verbal acknowledgment that the debt was due, would suffice to take the case *out of the statute*, as it was called, by raising an implied *assumpsit* or promise to pay the debt; upon which promise (as upon a new cause of action) the same time for instituting a suit would be allowed as upon the original contract. But the law on this subject has been since materially altered; for by 9 Geo. IV. c. 14, it is enacted, that in actions of debt or on the case, grounded upon any *simple contract*, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby

(*f*) As to this exception, see *Inglis v. Haigh*, 8 Mee. & W. 769, where it was held that it relates only to actions of account, or (perhaps) actions on

the case for not accounting. See also *Cottam v. Partridge*, 4 M. & Gr. 271.

(*g*) *Piggot v. Rush*, 4 Ad. & El. 912.

to take any case out of the operation of the 21 Jac. I. c. 16, unless such acknowledgment or promise be contained in some writing (*h*), to be signed by the party to be chargeable thereby; and that where there shall be two or more joint contractors, or joint executors or administrators of any contractor, no such joint contractor or joint executor or administrator shall be chargeable in respect only of the written acknowledgment of the other. This new enactment, however, is subject to a proviso that it shall not lessen or alter the effect of any *payment* of principal or interest made by any person whosoever.

2. The statute of 21 Jac. I. c. 16, was also in itself materially defective; for it made no provision for actions on bonds, indentures, or other instruments under seal; and consequently parties having claims on such instruments were at liberty to sue upon them in covenant or debt at any period of time however distant. And though to prevent the injustice which such a state of the law would otherwise have occasioned, it became the practice on the trial of such actions for the judge to recommend the jury, in cases where no payment on account of principal or interest had been made or demanded within twenty years, to presume that the bond or other specialty had been satisfied, this method of proceeding was found not to be attended with the same advantage, or to adapt itself so correctly to the purposes of justice, as a law of direct limitation. Such limitation has been consequently now provided with respect to claims on instruments under seal, as well as some other cases not embraced by the statute of James; it being enacted by the 3 & 4 Will. IV. c. 42, s. 3, that all actions of debt for rent or on any indenture of demise, or of covenant or debt on any bond or other specialty (*i*), and all proceedings on recognizance, shall be

(*h*) As to what is a sufficient *writing* to rebut the Statute of Limitations, see *Bayley v. Ashton*, 12 Ad. & El. 493. The statute is not rebutted by a recent item in an open account. *Cot-*

tam v. Partridge, ubi sup.

(*i*) *Strachan v. Thomas*, 12 Ad. & El. 536; *Paget v. Foley*, 2 Bing. N. C. 679; *James v. Salter*, 3 Bing. N. C. 544.

brought within twenty years after the cause of action or proceeding accrued; and all actions of debt upon an award (where the submission is not under seal), or for a copyhold fine or money levied upon any writ of *fiery facias*, within six years. Which enactment is subject, like those of the other statutes, to the exception with respect to any person under *disability*, as an infant, feme covert, *non compos*, or beyond the seas (*k*); and also to a proviso that if any acknowledgment in writing be signed by the party liable or his agent, or payment or satisfaction made in part on account of any arrears of principal or interest, the person entitled to the action may bring the same within twenty years after such acknowledgment, payment, or satisfaction; or, in case of disability, within twenty years after the disability shall have ceased (*l*).

3. By statute 31 Eliz. c. 5, all suits, indictments, and informations upon any *penal* statutes (*m*), made, or to be made, where any forfeiture is to the crown alone, shall be sued within two years from the commission of the offence; where the forfeiture is to a common informer alone, within one year (*n*); where to the crown and a common informer jointly, then by the common informer within one year, and by the crown within two years after that year is expired. But this statute did not extend to penal actions at suit of the party grieved; and therefore by 3 & 4 Will. IV. c. 42, s. 3, before cited, it is required that these shall be brought within two years after the offence shall have been committed, unless the particular statute which creates the forfeiture shall have expressly enacted otherwise.

4. By 24 Geo. II. c. 44, s. 8, it is provided that no action shall be brought against any *justice of the peace* for

(*k*) By the 7th section, no part of the United Kingdom, Man, Jersey, Guernsey, Alderney, or Sark, or the adjacent islands, shall be beyond the seas within the meaning either of this act or the 21 Jac. 1, c. 16.

(*l*) As to the manner of proceeding

where process is sued out to save the Statute of Limitations, see 2 Will. 4, c. 39, s. 10; Williams v. Williams, 10 M. & W. 174.

(*m*) As to these, vide sup. p. 535.

(*n*) Chance v. Adams, 1 Ld. Raym.

anything done in the execution of his office, or against any *constable*, headborough, or other officer acting as afore-said, unless commenced within six calendar months after the act committed (*o*).

5. By several acts relating to the *customs* and *excise*, actions against public officers concerned in carrying their enactments into execution are limited to periods of different lengths, which, however, in no case exceeds six months(*p*). And thus much of the law of limitation, whether as regards the remedies for the recovery of the realty, or those which have a different object. Between which the following distinction is observable,—that as regards the former, the statute 3 & 4 Will. IV. c. 27, has by its express provision (*q*) the effect of extinguishing the *right* as well as barring the *remedy*; but as regards the latter, the limitation by 21 Jac. I. c. 16, bars the remedy only. So that, though I can bring no action to recover a debt on a simple contract after the expiration of six years from the time that it first became payable, there is nothing to prevent my obtaining payment of it after that period, through the medium of any lien that I may hold on the property of the debtor (*r*).

(*o*) Vide sup. p. 44.

c. 53, s. 115.

(*p*) 1 Chit. Gen. Pr. 772, where the following acts are mentioned; 28 Geo. 3, c. 37, s. 23; 6 Geo. 4, c. 108, s. 97; c. 114, s. 64; 7 & 8 Geo. 4,

(*q*) Sect. 34.

(*r*) *Higgins v. Scott*, 2 B. & Ad. 413.

CHAPTER X.

OF THE PROCEEDINGS IN AN ACTION.

HAVING under the head of redress by suit in courts(*a*), examined in the preceding pages, first, the nature and several species of courts of justice, wherein remedies are administered for all sorts of civil injuries(*b*), we proceeded next to investigate the nature of the injuries themselves, and the remedies provided for them; and in the first instance turned our attention to that very large and important class of injuries which are cognizable in the courts of common law, and the remedy which those courts afford in different cases by action(*c*);—to complete our view of which, we are now to consider the manner in which that remedy by action is pursued and applied, and the course of proceedings which it involves. But as some of these proceedings are of a nature that, according to the ordinary practice of the courts, can be transacted only during the particular periods of the year called *terms*, it will be convenient to advert shortly to those forensic seasons, before we enter on the main business of the chapter.

[The terms are supposed by Mr. Selden(*d*) to have been instituted by William the Conqueror; but Sir H. Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church, being indeed no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom in

(*a*) Vide sup. Chap. III.

(*b*) Vide sup. Chap. IV., V., VI.

(*c*) Vide sup. Chap. VII., VIII., IX.

(*d*) Jan. Angl. l. 2, s. 9.

[very early times the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike; till at length the church interposed, and exempted certain holy seasons from being profaned by the tumult of forensic litigations, as particularly the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring, the time of Pentecost, which produced the third, and the long vacation between Midsummer and Michaelmas, which was allowed for the haytime and harvest. All Sundays also, and some particular festivals, as the days of the purification, ascension, and some others, were included in the same prohibition, which was established by a canon of the church, A.D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code (*e*).

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of King Edward the Confessor (*f*), that from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of holy church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the author of the Mirror (*g*) mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express (*h*), that in the reign of

(*e*) Spelman, Of the Terms.

(*g*) C. 3, s. 8.

(*f*) C. 3. *De Temporibus et Diebus Pacis*,

(*h*) C. 53.

[King Edward I. no secular place could be held, nor any man sworn on the Evangelists in the times of Advent, Lent, Pentecost, harvest, and vintage, the days of the great litanies, and all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations, of which many are preserved in Rymer's *Fadera* (i), that assizes and juries might be taken in some of these holy seasons. And soon afterwards, a general dispensation was established by Stat. Westm. 1, 3 Edw. I. c. 51, which declares, that "by the assent of all the prelates, *assize of novel disseisin, mortancestor and darreign presentment* shall be taken in Advent, Septuagesima and Lent; and that at the special request of the king to the bishops." The portions of time that were not included within these prohibited seasons fell naturally into a fourfold division, and from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael; which terms have been since regulated and abbreviated by several acts of parliament (k).] Their present regulation depends on the statute 11 Geo. IV. & 1 Will. IV. c. 70, amended by 1 Will. IV. c. 3.

At the time when these acts were passed, Michaelmas Term began on the 6th November and ended on the 28th of the same month: Hilary Term began on the 23rd January and ended on the 12th February; unless any of these four days happened to fall on a Sunday—for then the term began or ended on the day following; Easter Term began on the Wednesday fortnight after Easter Sunday, and ended on the Monday three weeks afterwards; Trinity Term on the Friday after Trinity Sunday, and ended on the Wednesday fortnight after it began (l). Two of the terms thus depended on the *moveable* feasts of Easter and

(i) Temp. Hen. 3, *passim*.

and 24 Geo. 2, c. 48.

(k) Trinity Term, in particular, had been regulated by 32 Hen. 8, c. 21; Michaelmas Term, by 16 Car. 1, c. 6;

(l) Christian's Blackstone, vol. iii. p. 278.

Trinity, which was attended with some inconvenience. But by the statutes just mentioned, they are now fixed to certain periods; and all the four terms are otherwise newly regulated; it being provided, that Hilary Term shall begin on the 11th, and end on the 31st January; that Easter Term shall begin on the 15th April, and end on the 8th May; that Trinity Term shall begin on the 22nd May, and end on the 12th June; and that Michaelmas Term shall begin on the 2nd November, and end on the 25th. And it is farther enacted (*m*), that if the whole, or any number of the days intervening between the Thursday before and the Wednesday next after Easter Day fall within Easter Term, there are to be no sittings in *banc* (*n*) on any of such intervening days, and the commencement of the ensuing Trinity Term is in such case to be postponed, and its continuance prolonged for an equal number of days of business. And farther (*o*), that in case the day of the month on which any term is to *end* shall fall on a Sunday, then that Monday next after shall be deemed to be the last day of the term. The case of the day of the month on which the term is to *begin* falling on a Sunday, is not provided for by these acts. It has been decided, however, that for the purpose of computation, the Sunday must in that case be considered as the first day of the term, although, as the courts do not sit, no judicial act can be done, or supposed to be done, till the following Monday (*p*).

With respect to the kind of proceedings which are conducted exclusively in term, we may remark, that in general all sittings in *banc* are of that character. But the sittings in the courts of *assize* and *nisi prius* (*q*) are held for the most part in vacation, that is, during the intervals between

(*m*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 6.

(*n*) As to sittings in *banc*, vide sup. p. 423. By 1 Will. 4, c. 3, s. 3, such intervening days are nevertheless to be taken as a part of the term, though

there are no sittings in *banc* upon them.

(*o*) 1 Will. 4, c. 3, s. 3.

(*p*) 1 Arch. Pr. by Chitty, 65.

(*q*) Vide sup. p. 423.

the terms, and (with the exception of a reasonable period of partial recess (*r*)) all proceedings taking place between the parties or their attorneys out of court, that is, not in the actual presence of the judges, may usually be transacted during the same intervals, as well as in term time (*s*). Moreover, for clearing off from time to time the accumulation of arrears, it has lately been provided by 1 & 2 Vict. c. 32, that it shall be lawful for the Courts of Queen's Bench, Common Pleas, and Exchequer, at their discretion, to hold sittings in banc, in time of vacation, at such times as are now by law appointed for holding sittings at nisi prius in London and Middlesex, for the purpose of disposing of business then pending and undecided in such courts respectively. And so much with respect to terms—the explanation of which seemed a necessary introduction to the proper subject of the chapter, viz. the proceedings in an action, to which we are now to invite the reader's attention.

[The most natural and perspicuous way of considering the proceedings in an action, will be to pursue the order and method wherein the proceedings themselves follow each other, rather than to distract and subdivide the subject by any more logical analysis.] The regular therefore and orderly parts of a suit at law, are these: I. The

(*r*) This period is from 10th August to 24th October, during which a part even of the business out of court (viz. the pleadings) are suspended, Reg. M. T. 3 Will. 4, pl. 12. As to the *holidays* allowed in the common law courts and offices, see 3 & 4 Will. 4, c. 42, s. 43; Reg. Gen. H. T. 2 Will. 4; and as to office hours, Reg. Gen. H. T. 1 Will. 4.

(*s*) The practice on this subject was formerly very different. All writs must have been made returnable in term; every pleading and every entry of judgment, even when in fact delivered or entered in vacation, must

always have been intitled of some antecedent term, and the plaintiff, though at liberty to *declare* in vacation, could not compel the defendant to plead until the subsequent term; and a party obtaining a verdict in vacation on the trial of any issue, or any inquisition of damages, had also to wait in every case until the term next following, before he could allow final judgment, or take out execution. Second Com. Law Report, p. 28. It is within the last fifteen years only that these inconveniences have ceased to exist.

process ; II. The pleadings ; III. The trial and evidence ; IV. The judgment ; V. The writ of error, (where the judgment is supposed to be erroneous) ; VI. The execution.

I. To begin then, with the *process* ;—

The first object in an action is to compel the defendant's *appearance*, in order that he may have an opportunity of being informed of the plaintiff's demand or complaint, and of encountering it in such manner as he may think fit. And in every personal action it is an invariable rule that until the defendant has thus *appeared*, no judgment can in any case be awarded (*t*). The term *appearance* (whether applied to plaintiff or defendant) has reference to an antient state of practice, by which the litigant parties personally, or by their respective attorneys, actually confronted each other in open court. But their appearance has for centuries past ceased to be an actual one, and that of the defendant (with which we are now more immediately concerned) imports no more than a written entry, or act in court, in such form as the practice of the court prescribes, by which the defendant admits that he has had a general intimation of the suit, and is ready to receive more particular statement of its ground and object. This appearance is enforced, and the intimation above mentioned conveyed, by a *writ*,—a species of written instrument employed on many different occasions in the course of an action, and purporting to be a mandate from the sovereign to the party to whom it is addressed, directing him to perform, or to abstain from the performance of, some act therein specified. The writ by which the particular object of the defendant's appearance is enforced, and those (if any) which it may become necessary to issue for the same purpose after the first writ has failed, are called *writs of process*, or, more compendiously, *process* (*u*).

(*t*) *Watson v. Dore*, 2 Mee. & W. 386.

(*u*) The writs to enforce appearance above mentioned, in a sense exclusive

of the original writ to be presently mentioned, are also described in the books as *mesne process*.

The process formerly began with an *original writ*, which was an instrument issued out of Chancery in the name of the sovereign, under the Great Seal, (instead of being merely under the seal of the court of common law itself, as was usual with other process,) commanding the sheriff to require the defendant to appear in the court of common law, to answer to some particular cause of action in the writ set forth. This mode of commencing a suit, which (as we shall see hereafter) (*v*) is not yet laid aside in the real actions which still exist, was antiently in universal use, and is a practice of remote antiquity. We may also take occasion to remark here that great technical importance was attached to a writ of this description. For as it had constituted from time immemorial the first step in the suit, and always set forth (in general or special terms according to the nature of the case) the circumstances upon which the suit was founded, it had incidentally the effect of defining the scope and number of our legal remedies themselves; it being held that no action would lie unless the case was one for which a precedent could be found in the *Register of Original Writs*. Thus the law of writs (that is, of original writs) became in effect identical with that of actions, and the same remedy is described indifferently as a *writ* of trespass, for example, or of dower, or an *action* of trespass, or of dower. In course of time, however, new modes of commencement were devised, by connivance of the judges, in order to avoid the expense of an original writ, (for which a fine or fee, of considerable amount, was in many cases payable to the crown), and with the view also of enabling the Courts of King's Bench and Exchequer to effect that incroachment or usurpation on the jurisdiction of the common Pleas to which we referred in a former part of this volume (*x*). We shall not encumber our text with any attempt to explain the nature of these devices, or the manner in which they severally operated, which are now become matters of mere curiosity (*y*). It will suffice

(*v*) Vide post, p. 658.

(*y*) See the notes, *ibid*.

(*x*) Vide supra, pp. 400, 409.

to say that they had the effect of irregularly introducing into each of the three courts the use of a variety of writs of different descriptions by way of alternatives for the antient course of suing out an original writ under the great seal; that the result of this was at length to involve the first stages of the suit in great and unnecessary complexity; and that the Commissioners appointed in 1828 for inquiry into the course of proceedings at common law, having been consequently led to recommend the adoption of a simpler and more uniform system (z), an act of parliament was eventually passed for the purpose.

By this statute, 2 Will. IV. c. 39, intituled "An Act for Uniformity of Process in Personal Actions in his Majesty's Courts of Law at Westminster," and by the rules of court founded upon it (a), and the subsequent statutes passed for its amendment (b), it is now provided that all personal actions shall be commenced by *writ of summons*, which is a writ issued out of the court in which the action is brought, directed to the intended defendant himself, and which, without setting forth the particular cause of action, but merely describing the action as one of debt, trespass, or the like, commands him to cause an appearance to be entered therein, within eight days after the writ shall have been *served* upon him (c). This *service* the plaintiff, or his attorney, is accordingly bound to effect, by leaving a copy of it with the defendant *personally*, and showing him at the same time the original, if he so requires (d). And if difficulties occur, so that the service cannot be effected during the period that the summons is allowed to remain in force,

(z) See First Com. Law Report.

(a) Reg. Gen. M. T. 3 Will. 4.

(b) 3 & 4 Will. 4, c. 67; 1 & 2 Vict. c. 110.

(c) The summons has also a *memorandum* subscribed, directing it to be executed within four calendar months; and an *indorsement* of the name and place of abode of the attorney in whose

name it is sued out, and of the country attorney (if any) who instructs him. There is also to be written on it the amount of the debt and costs claimed, and a notice that on payment thereof in four days, the proceedings will be stayed.

(d) Arch. Pr. by Chit. p. 521.

(which is four calendar months), or cannot be effected in the county in which the defendant was at first resident, the plaintiff may resort to other writs of process, repeating the requisition of the original summons, and called *alias* and *pluries* writs of summons. But upon the due service of any one of these writs, the defendant is bound to *appear* within the time specified, and if he fails to do so, the plaintiff may cause an *appearance* to be entered for him(*e*).

If on the other hand it should be found impracticable to get at the defendant *personally*, so as to effect such service as above described, and there is reason to believe that he keeps out of the way, the plaintiff may then, on application to the court in which the action is brought, and proving to the court's satisfaction that he has made such attempt for that purpose as the course of practice requires,—but without effect,—obtain leave to issue a *distringas*; which is a writ issued out of the same court, directed to the sheriff of the county in which the defendant resides, or has any goods or chattels, commanding him to distrain upon the goods and chattels of the defendant for 40s. in order to compel his appearance, and also to make known (or *return*, as it is usually called) to the court, on some day in term, therein specified, (which is called the *return day* of the writ,) how the same shall have been executed. A notice is also subscribed thereto, informing the defendant of the distress and of its object, and warning him to make *appearance* in eight days inclusive after the return day (*f*). This process the sheriff is accordingly to execute by seizure of goods of the defendant to the value therein mentioned, and at the same time the *distringas* and notice, or a copy of them, should, if possible, be served on the defendant personally, or if he cannot be found, left at the place where the goods are seized (*g*). And after

(*e*) Arch. Pr. by Chit. 526.

(*f*) 2 Will. 4, c. 39, s. 3. The writ and copy are also to be *indorsed* in the same manner as the writ of

summons. Arch. by Chit. p. 533; Reg. H. T. 2 Will. 4, r. 2, pl. 3; Reg. Gen. M. T. 3 Will. 4, pl. 5.

(*g*) 2 Will. 4, c. 39, s. 3.

such execution of the *distringas*, the plaintiff will then be at liberty, at the expiration of the time limited in the notice, to enter an appearance for the defendant, in the event of his having entered none for himself (*h*).

But if the defendant should happen to have no goods upon which the distress can be executed, and cannot be found so as to be served personally, the sheriff will make return to the *distringas* accordingly, of *non est inventus*, and *nulla bona*; and in that case it is competent to the plaintiff, in the event of the defendant's having entered no appearance within the time prescribed, to apply to the court for leave to enter an appearance for him, and to proceed thereon to judgment and execution,—which application the court will grant as of course, if proof (by affidavit) be made to their satisfaction, that due and proper means were used to serve and execute the *distringas* (*i*).

Under the same circumstances, viz. the return of *non est inventus* and *nulla bona* to a writ of *distringas*, the plaintiff has also the option, in general, of proceeding to *outlaw* the defendant (*j*). This method is of great antiquity, and in the practical course that it pursues, better adapted, it must be owned, to a former state of society than to the present times. Yet its ultimate object is of such importance as still to secure it a place in our judicial system, viz. that of obtaining effectual access to the *property* of a defendant, who withdraws his *person* from a legal demand (*h*). It commences by a writ of *exigent* (or *exigi facias*), issued from the same court, and directed to the same sheriff as the

(*h*) Arch. by Chit. p. 526; Page v. Hemp, 4 Dowl. 203.

(*i*) 2 Will. 4, c. 39, s. 3.

(*j*) 2 Will. 4, c. 39, s. 5; Nugee v. Swinford, 9 Dowl. 1038; Hewitt v. Melton, 3 Tyrw. 822. But not if he be a peer or member of parliament, for such persons are exempt from outlawry. Cassidy v. Steuart, 2 Man. & Gr. 437. It may be remarked too, that if the proceeding be against a

woman, she is said to be *waived*, and not *outlawed*. James v. Jenkins, 9 Moore, 589. And an infant under twelve years of age cannot be outlawed. Co. Litt. 128 a.

(*k*) Where there are several defendants, there may be outlawry against one or more of them; and till the latter are outlawed, or have appeared, plaintiff cannot proceed in the action against the rest.

distringas, and returnable, like the *distringas*, on some specified day in term, commanding the sheriff to cause the defendant to be exacted or required from county court to county court (or if in London, from husting to husting), until he either be outlawed or appear to the action. At the same time there issues a writ of *proclamation*, directed and returnable in like manner, commanding the sheriff to cause the defendant to be proclaimed on three several days; first, at the county court; secondly, at the quarter sessions; and lastly, at the church of the parish where he has been resident, by fixing a copy of such proclamation on or near the church door (*l*). If the defendant having been called or exacted, under the exigent, at five successive county courts, and also duly proclaimed under the writ of proclamation, should still neglect to appear, he is then adjudged an outlaw; upon which the plaintiff (having first procured a return to be made of such outlawry) causes to be issued a writ of *capias utlagatum* (*m*), commanding the sheriff to take his person, and also to summon a jury to make inquisition as to his property, and seize it into the queen's hands as forfeited; which inquisition, being afterwards returned into the Court of Exchequer, that court will issue processes of *venditioni exponas*, or *scire facias* (*n*), or *levari facias* (as the case may be), to sell the defendant's goods, to collect his debts, and to levy the profits of his lands (*o*), and will order the proceeds to be applied, as far as requisite, to the satisfaction of the plaintiff's claim, or grant him a lease of the defendant's lands, to enable him to obtain satisfaction for the same. The defendant also, as the term of outlawry itself imports, is put out of the protection of the law, so as to be disabled, in general, from enforcing any of his legal rights in a court of justice (*p*);

(*l*) 31 Eliz. c. 3; 7 Will. 4 & 1 Vict. c. 45.

(*m*) This writ is in its form either *general* or *special*. The first directs seizure of the person only; the second, of person and property.

(*n*) As to this writ, vide post, p. 654.

(*o*) Smith, Act. at Law, 2d ed., p.

52.

(*p*) Walker v. Thelluson, 1 Dowl. N. S. 578; Byrne v. Manning, 2 Dowl. N. S. 403.

and the action remains, for want of his appearance, in suspense. But it is competent to the defendant to come in at any time, and obtain a *reversal* of the outlawry; which, if there have been any irregularity and oppression in the proceedings, will be done at the plaintiff's expense; but if there have been neither, then at the expense of the defendant; and in all cases, upon condition only of his entering an appearance to the action (*q*).

By one or other of these methods the plaintiff is certain of either obtaining satisfaction of his demand, out of such property as the defendant possesses in this country, or at least of compelling an appearance, so as to enable the action to proceed. But it may happen that though the defendant be resident within the realm, and have property there, the circumstances may be such as to make it useless to prosecute the action farther, unless the plaintiff be allowed to institute a collateral proceeding, by way of arrest of the defendant's person, for it may be ascertained or suspected that he is about to abscond from the realm, so as to place his person and property out of reach, and consequently to render any judgment that may be ultimately obtained against him fruitless. In such case, therefore, if the plaintiff can show (upon affidavit), to the satisfaction of a judge of one of the superior courts, that he has a cause of action against the defendant, to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is about to quit England, the judge will make an order that the defendant be held to bail for such sum (not exceeding the amount of the debt or damages), as shall appear expedient (*r*). This order may be made at any time between the commencement of the action and final judgment; and

(*q*) *Graham v. Henry*, 1 B. & Ald. 131; *Pigou v. Drummond*, 1 Bing. N. C. 354; *Hunter v. Whitfield*, 3 Bing. N. C. 878. As to the mode of obtaining restitution of the money levied under the *capias utlagatum*, see

Croft v. Lord Percival, 7 Scott, 847.

(*r*) As to what affidavit is sufficient under 1 & 2 Vict. c. 110, s. 3, see *Gibbons v. Spalding*, 11 Mee. & W. 173; *Heath v. Nesbitt*, ib. 669.

having obtained it, the plaintiff is at liberty to sue out a writ of *capias ad respondendum*, directing the sheriff to arrest the defendant; who remains in custody on such arrest until he shall have either given a bail bond, or made a deposit of the amount for which the arrest was ordered, together with 10*l.* for costs (*s*). The object both of bail bond and deposit is to afford security to the plaintiff, that afterwards, viz. within eight days inclusive from the arrest (*t*), the defendant shall put in *special bail to the action*, that is, procure two responsible persons (being either housekeepers or freeholders) to enter into a recognizance, engaging that in the event of judgment being given against defendant, he shall either pay the debt or damages, or render himself to prison in satisfaction thereof, or that they will themselves make payment thereof on his behalf (*u*). But it is now time to return to the main progress of the suit, to which this proceeding by way of arrest is merely collateral.

II. After the appearance, by whatever method effected, the *pleadings* between the parties follow.

These are the mutual altercations between the plaintiff and defendant, which at present are drawn up in writing, and delivered between them out of court, [though formerly they were put in by their counsel *ore tenus* or *vivâ voce*, in court, and then minuted down by the chief clerks or prothonotaries; whence in our old law French the pleadings are frequently denominated the *parol* (*v*).]

(*s*) 1 & 2 Vict. c. 110, s. 3—7.

(*t*) Lush, Pr. 614.

(*u*) Ibid. 616, 623.

(*v*) The pleadings, the arguments of counsel, and the decisions of the court, were formerly in Norman or law French. "An evident and shameful badge," says Blackstone, (vol. iii. p. 317,) "of tyranny and foreign servitude, being introduced under the auspices of William the Norman and his sons, whereby the ironical observation of the Roman satirist came to be literally verified, that

"*Gallia caudicibus docuit facunda
Britannos.*"—Juv. xv. 111." Afterwards, by stat. 36 Edw. 3, c. 15, it was enacted, that for the future all pleas should be pleaded, shown, defended, answered, debated and judged in the English tongue, but be entered and enrolled in Latin; which last provision, as to *entering and enrolling* (that is, recording), contained nothing new, though Blackstone's observations on this subject would lead his readers to suppose it a novelty, for our records, from the earliest period to which

The method according to which the pleadings are framed is of a highly artificial character, having been elaborated by the care of judges and practitioners during many successive centuries into a regular system or science called *pleading* (or more popularly *special pleading*), which constitutes a distinct branch of the law, with treatises and professors of its own. Independently of its intrinsic utility and value, which are highly rated by our lawyers, it is calculated to excite curiosity as a forensic invention, due to the dialectic genius of the middle ages; and which, though long since forgotten on the continent, where it seems to have originated, has been cherished and cultivated with continually increasing regard, even to the present day, in the common law courts of England.

The object of this system of allegation is to ascertain the point in controversy between the parties, in order that if it should turn out to be matter of law, it may be referred to the decision of the judges of the court, or if matter of fact, to trial by jury, or such other method as the law may have provided for the trial of a question of that particular kind. When this result is attained, the parties are said to be *at issue* (*ad exitum*), or at the end of their pleading; and the emergent question itself is termed *the issue*; and, according to the nature of the case, may turn out to be either an *issue in law* or an *issue in fact*.

To convey a complete idea of the manner in which the parties are thus brought to issue, it would be necessary to introduce examples, and to notice all the different rules which the science of pleading requires the pleader to observe, in constructing his allegations—a disquisition which would obviously carry us far beyond the limits

they can be traced, were always framed in Latin. At length, by stat. 4 Geo. 2, c. 26, amended by 6 Geo. 2, c. 6 and c. 14, it was provided, that all records and other proceedings whatever shall be in English, and be written in a common and legible hand,

and not in *court hand*; though by the last of these statutes it is still lawful to express the *proper names of writs*, and other *process or technical words*, in the same language as had theretofore been commonly used.

proper to a work like the present (*v*). We shall confine ourselves, therefore, to explanations of a more general kind.

And, first, we may remark, that the pleadings or mutual allegations are always to consist of matter of *fact*, and of fact only—for all matters of *law* are judicially noticed by the court, and supposed to be known to the adverse party also, or to the pleader who conducts the altercation for him; and therefore the allegations on either side, of the facts respectively relied upon, will always suffice to develop the legal positions which apply to the case between the parties, and the question or questions of law (if any) which are in dispute between them. It is also a rule of the same general nature, that in their allegation of fact, the pleaders should abstain from any statement of the *evidence* by which the fact is to be established,—for matter of evidence, though essential for the consideration of the jury, by whom the issue or question of fact is to be tried, is superfluous so far as the object of pleading is concerned,—which is merely to ascertain whether the question is matter of fact or matter of law, and if the former, to develop it in a shape sufficiently precise to show its general nature and import—but not to determine on which side of the question the truth lies, that being the province not of pleading, but of trial.

These principles being premised, we may proceed to a general examination of the nature and order of the pleadings themselves.

The first of these is the *declaration* (*narratio*) (*x*). At the commencement, and in the margin of this, is always

(u) The author has attempted this task in a former work on the "Principles of Pleading."

(1) The plaintiff may *declare* immediately after the *appearance*, but is not compellable to do so until the end of the term next after the appearance.

He must declare, however, in one year after the service of the writ of summons; for otherwise he is considered as *out of court*, unless the court shall have by special order enlarged his time for declaring. Lush, Pr. 335, 336.

inserted some county, called the *venue in the action* (*y*); and the object of its insertion is to show in what county the plaintiff *lays the action*; that is, proposes to have the action tried, in the event of arrival at an issue in fact to be tried by jury. In local actions, the venue must be alleged according to the truth of the fact; in transitory ones (*z*), the plaintiff may lay the action in what county he pleases; subject to the right of the defendant to have the venue *changed*; which alteration he is in general entitled to have made, upon affidavit that the cause of action arose wholly in some other county; though the plaintiff has, on the other hand, a right to *bring the venue back*, upon an undertaking to give some material evidence arising in the county first alleged (*a*). The declaration then proceeds to allege in short and precise terms (*b*) the circumstances of the plaintiff's complaint, so as to show him entitled to maintain an action in the particular form that had been mentioned in the summons (*c*), and concludes with an allegation of the amount of damage that he has sustained by the tort or breach of contract of which he complains. Also, if he happens to have *several* different demands, such as in their nature, and according to the rules of pleading, are recoverable in the same form of action, he is entitled to

(*y*) The declaration, and all subsequent pleadings, are also subject to the formal rule, that they must be *intituled* of the court in which the action is brought, and the day of the month and year when the same are respectively pleaded. Vide Reg. Gen. M. T. 3 Will. 4, r. 15; H. T. 4 Will. 4, r. 1.

(*z*) As to local and transitory actions, vide sup. p. 463.

(*a*) As to change of venue, see *Nicholls v. Stockbridge*, 4 Man. & Gr. 456; *Fife v. Bousfield*, 2 Dowl. N. S. 705; *Webb v. Bulkeley*, *ibid.* 900.

(*b*) Where the declaration is in *indebitatus assumpsit*, or *debt on simple contract*, the practice requires that

there should be delivered to the defendant or his attorney, collaterally to the declaration, and at the same time with it, the *particulars of the plaintiff's demand*, which contain a more detailed account of the nature and amount of his claim. Reg. Gen. T. T. 1 Will. 4, r. 6. And in other forms of action the court will often, on the application of the defendant, order such *particulars* to be given. *Bulnois v. Mackenzie*, 4 Bing. N. C. 127. But they are in no case considered as part of the *pleadings*, so as to require any answer from the opposite party.

(*c*) *King v. Skeffington*, 3 Tyr. 318; *Youlton v. Hall*, 4 Mee. & W. 582.

insert them cumulatively in the same declaration, which is done in several consecutive statements, technically denominated *counts* (*d*).

After the plaintiff has stated his case in the declaration, it is the defendant's turn to consider in what manner it shall be encountered. And the rules of pleading require him to address himself to this subject, in the following manner. If the matter in the declaration appears, on the face of it, insufficient in point of law to entitle the plaintiff to the redress he claims, and that, either as regards the substance of the case, or the form in which it is stated, the defendant's course is to *demur*, that is, to deliver a written formula, called a *demurrer*, (from *demorari*,) importing that he denies the sufficiency, and will wait the judgment of the court whether he is bound to answer. And this demurrer is either *general* or *special*, that is, it either objects in general terms, or specially sets forth the particular objection. And by 27 Eliz. c. 5, and 4 Ann. c. 16, it is provided that all objections of mere form must be raised in the shape of special, and not of general, demurrer. If, on the other hand, the plaintiff's statement appears *ex facie* sufficient in point of law, the defendant's course is to *plead*; that is, to deliver a *plea*; the general object of which is to make answer in point of *fact* to the declaration. If he neither demurs nor pleads within the time allowed by the practice of the court for that purpose (*e*), the plaintiff will be entitled to sign judgment against him as by default (*f*). The defendant may, however, before

(*d*) It was formerly usual to insert different counts even in the *same* cause of action, in order to enable the plaintiff, if he failed in his proof on one, to succeed on another. 3 Bl. Com. 294. But this is now prohibited by Reg. Gen. H. T. 4 Will. 4, r. 5, 6, 7.

(*e*) In causes where the venue is laid in London or Middlesex, and defendant lives within twenty miles of London, defendant must demur or

plead in four days; if he lives beyond that distance, or the venue be laid elsewhere, then in eight days. Lush, Pr. 367. Pleas in abatement, however, must in all cases be pleaded in four days. Lush, Pr. 407.

(*f*) In all cases where the defendant has *appeared*, a *notice to plead* and a *demand of plea* are both necessary before the plaintiff can sign judgment by default. Both of these demands

he does either, *crave oyer* of the bond or other specialty (if any) upon which the action is brought (*g*); that is, he may demand to hear it read to him, [the generality of defendants in the times of antient simplicity being supposed incapable of reading it themselves.] This is now done, as the pleadings are no longer *vivâ voce*, by carrying the instrument to the defendant or his attorney, and permitting inspection, and, if required, delivering him a copy; and till this has been performed by the plaintiff, all farther proceedings in the suit are suspended.

The plea may be either *dilatory* or *peremptory*. Dilatory pleas (which by statute 4 Ann. c. 16, cannot be received unless supported by affidavit of their truth) are founded on some matter of fact not connected with the merits of the case, but such as may exist without impeaching the right of action itself, and are either pleas *to the jurisdiction*, showing that by reason of some matter therein stated the case is not within the jurisdiction of the court; or pleas in *suspension*, showing some matter of temporary incapacity to proceed with the suit; or pleas in *abatement*, showing some matter for *abating* or quashing the declaration. On the other hand, peremptory pleas (more usually called pleas in bar) are founded on some matter tending to impeach the right of action itself.

Pleas in bar are subject also to various divisions. For, first, they comprise the class of *general issues*, which are denials (expressed in a particular form, as fixed by antient precedent) of the whole matter in the declaration, or at least of the principal fact upon which it is founded,—as

are usually indorsed on the declaration; Lush, Pr. 366, 368. The plaintiff must also enter at the proper office a *rule to plead*, which is a mere formal proceeding. Ibid. 390.

(*g*) Where the cause of action does not arise on a specialty, but on some unsealed instrument, oyer cannot be demanded; but the practice in that

case is, for the defendant to apply to a judge at chambers, to allow him inspection or a copy of the instrument, which will generally be granted. The difference between the two proceedings is, that oyer is considered as part of the *pleading*, but the other method is not.

(in trespass *vi et armis*, or trespass on the case), that the defendant is *not guilty*; (in debt or bond), that *it is not his deed*; (in debt or simple contract), *nunquam indebitatus*; (in assumpsit), *non assumpsit*;—while all other pleas in bar are distinguished from the general issues by the term of *special pleas*. Again, pleas in bar are distinguished from each other according to their subject matter, as pleas in *justification*, or *excuse*, and *pleas in discharge*. A plea in justification or excuse is one that tends to show that there was *never* any right of action: as where in trespass for assault and battery, the defendant pleads *son assault demesne*, viz. that it was the plaintiff's own original assault; or in an action on the case for slander, that the words alleged to have been spoken of the plaintiff are true. But pleas in discharge are those which show that the cause of action, though once existing, has been barred by matter subsequent; as by payment, or release, or accord and satisfaction, or by the Statute of Limitations, or a *set-off*; which last occurs where the plaintiff sues for a debt, and the defendant alleges a reciprocal debt due to him from the plaintiff, and claims to have it allowed by way of discharge from the action, either wholly or in part, as the case may be (*h*).

With respect to all pleas in bar, however, it is a fundamental rule, that they must either *traverse* (that is, deny) the matter of fact in the declaration, or *confess and avoid* it; that is, admitting it to be true, show some new matter of fact tending to obviate or take off its legal effect. Thus, the general issue of not guilty, in an action of trespass for assault and battery, denies the act of violence alleged; while, on the other hand, the plea of *son assault demesne* in the same action, confesses that act, but *avoids* it by showing circumstances of excuse or justification. So in an action of debt or assumpsit for goods sold and delivered, the general issue of *nunquam indebitatus* or *non assumpsit*

(*h*) A plea of set-off was not allowed at the common law, but it is given by 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24.

traverses the sale and delivery ; a plea of payment confesses both, but *avoids* them by showing matter of discharge. Yet to this rule there are certain exceptions. Thus the defendant in an action for a liquidated sum of money may avail himself of a plea of *tender* (*i*) : that is, he may plead that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff, and now brings it into court, ready to be paid to him ; —or he may, in most actions, resort to a plea of *payment of money into court* ; viz. that he brings a certain sum of money into court, ready to be paid to the plaintiff, and that the latter has no claim to any greater amount ; —or in any action, he may have occasion to plead by way of *estoppel* (*k*), as that the plaintiff ought not to be permitted to make a particular allegation, because he has formerly done some solemn act (as by deed under his hand and seal) involving an assertion to the contrary. As to all which pleas, it is evident that they are in the nature of exceptions to the general rule above stated. For in the two first (admitting, as they do, the right of action,) there is a confession without avoidance ; and in the last, there is neither confession nor avoidance (*l*).

As the plaintiff, who has several subjects of demand or complaint, is allowed to insert several counts in his declaration, so the defendant, who has several distinct matters of defence, is permitted (upon first obtaining the leave of the court for that purpose) to resort to as many different pleas ; and where there are several counts, to each of which he happens to have different defences, he may on the same principle apply different pleas to *each*. At common law the case was different ; for in order to avoid confusion and

(*i*) As to plea of tender, see *Eckstein v. Reynolds*, 7 A. & E. 80 ; *Poole v. Tunbridge*, 2 Mee. & W. 223.

(*k*) As to estoppel, see *Cardwell v. Lucas*, 2 Mee. & W. 117.

(*l*) The plaintiff must reply within

four days after he shall have been ruled to do so on the part of the defendant ; and the practice is similar with respect to the rejoinder, and all the subsequent pleadings. *Lush's Pract.* 423, 428.

prolixity, defendants were confined, under the antient system of pleading, to a single plea in respect of a single count; and where the declaration consisted of several, then to a single plea in respect of each. But this rigour being found incompatible with justice, the indulgence of several pleas, by leave of the court, was at length introduced by the statute 4 Ann. c. 16 (*m*).

The plea being delivered, it is then to be encountered by the plaintiff, upon peril that if he fail to do so within the proper period (*n*), the defendant is entitled to sign judgment by default. In encountering the plea, the plaintiff is put to the same alternative of demurring or pleading to it, as the defendant was with regard to the declaration. If he pleads, he is said to *reply*, which he does by delivering a *replication*; and to this also the same alternative applies that was before noticed in the case of the plea, viz. that it must either traverse the last pleading, or confess and avoid it. In this manner, and subject at each step of the series to the same two alternatives, are delivered the respective allegations of the parties, until the pleading is exhausted; and we shall particularize them no farther than by adding, that to the replication the defendant may *rejoin*, or deliver an answer called a *rejoinder*; that the plaintiff may answer the rejoinder by a *surrejoinder*; that the defendant may upon that deliver a *rebutter*; and that this may be followed by a *surrebutter* on the part of the plaintiff; that beyond a surrebutter the pleadings seldom happen to extend, and they are not distinguished after that point by any separate denomination (*o*).

(*m*) This afterwards led to the abuse of allowing defendants to plead several pleas where there was in fact only *one* ground of defence: that is, to shape a single ground of defence in various modes; so that on failing to prove one plea, he might have a chance of proving another. But by Reg. Gen. H. T. 4 Will. 4 (5), it is now provided that pleas founded on one and the

same principal matter, and varying in statement, description or circumstances only, shall not be allowed.

(*n*) All pleas and other pleadings, with the exception of those concluding to the country, and a few others, must be delivered under the signature of *counsel*.

(*o*) Blackstone remarks (vol. iii. p. 310), that these pleas, replications,

At some stage of this series more or less remote, it is obvious that the parties will necessarily be *brought to issue*; for as the allegation of new matter cannot be interminable, they must at length arrive either at some exception, by way of demurrer, to the sufficiency of the last pleading, which is an issue in law; or at the denial on one side, of some matter of fact alleged on the other, which is an issue in fact. In either case the party demurring or traversing is said to *tender issue*, and he is required to do so under an appropriate formula, indicating that this result has been obtained. In the case of an issue in law the words are, “that the declaration (or plea &c.) is not sufficient in law (*p*),” which issue is accepted on the other side, by what is called a *joinder in demurrer*, that is, by the words following: “that the declaration (or plea &c.) is sufficient in law.” In the case of an issue in fact the formula indicates not only the attainment of the issue, but the mode of trial adapted to the particular question. When this is trial by jury (which is now almost invariably the case) the words are as follows: “and of this the defendant puts himself upon the country;” or thus: “and this the plaintiff prays may be inquired of by the country;” and the issue and form of trial are then both accepted on the other side (unless there appears ground for demurrer) by the words following, “and the plaintiff (or defendant, as the case may be) doth the like,” which latter words are called the *joinder in issue*, or *similiter*.

We have said that issues in law are to be referred to the

&c. answer to the *exceptio, replicatio, duplicatio, triplicatio, quadruplicatio*, of the Roman laws; and cites 4 Inst. 14; Bract. l. 5, tr. 5, c. 1.

(*p*) The demurrer must be signed by counsel; and by Reg. H. 4 Will. 4, r. 1, pl. 2, it is ordered, that “in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be

“delivered without such statement, or
“with a frivolous statement, it may be
“set aside as irregular, by the court
“or a judge, and leave may be given
“to sign judgment as for want of a
“plea, provided that the party demur-
“ring, may, at the time of the argu-
“ment, insist upon any farther mat-
“ters of law, of which notice shall be
“given to the court in the usual way.”

decision of the judges of the court. This is done upon solemn argument by counsel on both sides; and to that end a *demurrer book* is made up, containing all the proceedings at length, which is delivered between the parties, and usually by the plaintiff's attorney to the attorney for the defendant (*q*). The demurrer is then *set down for argument*, which may be done at the request of either party, and notice of it is forthwith given to the adversary; and four clear days before the day appointed for argument the plaintiff delivers copies of the demurrer book to the lord chief justice, or (in the Exchequer) to the lord chief baron, and the senior judge of the court, and the defendant delivers copies to the two other judges (*r*) (only four in each court presiding at the same time), and, on the appointed day, the case is called on for argument (*s*). After hearing counsel on either side, the court deliver their judgment. For example, [in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causâ venationis*, for that he was hunting, and to this the plaintiff demurs, that is, admits the truth of the plea, but denies the justification to be legal; now on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. And thus is an issue in law or demurrer disposed of.] As to which, however, we may farther remark, that the judges in delivering their judgment usually also make known *seriatim* the reasons for their opinion.

(*q*) Reg. H. 4 Will. 4, r. 1, pl. 5;
Reg. E. 11 Will. 3, K. B.

(*r*) Reg. H. 4 Will. 4, r. 1, pl. 6.

(*s*) "In all special arguments notice in writing of the points which are intended to be insisted on by each of the parties are to be delivered to the judges at their chambers two days before the day on which the case shall be set down for hearing, either by marking the points in the

"margin of the books delivered to the judges, or on separate papers; and each of the parties is, within the same time, to leave a copy of such notice at the chambers of the lord chief justice, to be delivered to the adverse party upon his application." Reg. T. 11 Geo. 4; 6 Bing. 802. The practice is believed to be the same in all the courts. Lush's Pract. 702.

III.—The *trial and evidence*.

If the result of the pleading be not an issue in law, but an issue in fact, it then becomes necessary to determine on which side of that issue or question the truth lies, a point that is not left, like matter of law, to the court or judges, but to such other methods of decision, as are appropriate by the laws of England to the particular kind of question; and this decision of fact is what is technically understood by the term *trial*,—as to which it may be remarked that it constitutes in every civilized country the chief business of courts of justice,—[for experience will abundantly show that above a hundred of our law suits arise from disputed facts, for one where the law is doubted of (*t*).]

Of trials there are several different species, according to the difference of subject or thing to be tried,—but with the exception of trial by jury, the scope of each is very limited, and its occurrence very infrequent. The several methods are as follows:—1. Trial by record; 2. Trial by certificate; 3. Trial by witnesses; 4. Trial by jury (*u*).

(*t*) About twenty days in the year, says Blackstone, are sufficient in Westminster Hall, to settle upon solemn argument, every demurrer or special point of law that arises throughout the nation; but two months are annually spent in deciding the truth of facts before six distinct tribunals, exclusive of Middlesex and London, which afford a supply of causes much more than equivalent to any two of the largest circuits." 3 Bl. Com. 330. The state of things in our own days is substantially the same.

(*u*) Blackstone mentions seven methods of trial, comprising in addition to those in the text, the trial by *inspection*, the trial by *wager of battel*, and the trial by *wager of law*. 3 Bl. Com. 330. But as regards the first, it seems doubtful how far, since the abo-

lition of real actions, fines, and appeals of maihem, if can be considered as in force. And wager of battel has been abolished by 59 Geo. 3, c. 46; and wager of law by 3 & 4 Will. 4, c. 42, s. 13. These three modes of proceeding indeed have long been of so antiquated a character as scarcely to deserve a place in a treatise on the existing law. The account given of the trial by *inspection* by Blackstone, is, that it takes place when for the greater expedition of a cause in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court upon testimony of their own senses shall decide the point in dispute. Trial by *wager of battel* was the decision of the question of right, in the real action called the

1. First then of the trial by *record*. And here first we may remark that a *record* signifies a roll of parchment upon which the proceedings or transactions of a court are entered or drawn up by its officers, and which is then deposited in its treasury, *in perpetuam rei memoriam*. It is also used indifferently, to express the matter itself which is so entered or transcribed. The time and manner of drawing up these records in the course of an action will appear hereafter. At present it is sufficient to observe that when complete they are regarded by our law with very peculiar consideration. For they constitute the only strict and proper proof of the proceedings of the court in which they are preserved; and are also proof of so transcendant and absolute a nature as to admit of no contradiction (*v*). The practice too of drawing up and preserving such documents is confined to the higher courts of justice, so as to have created the distinction, which we have elsewhere had occasion to notice, between courts of record and courts not of record (*x*). As to the mode of trial now in question, it is used only in the particular instance where a matter so recorded, (for example, a judgment,) is pleaded by one of the parties, and the other pleads *nul tiel record*, that there is no such matter of record existing. Upon this issue is tendered and joined in the following form: "And this he is ready to verify by the record, and prays that the same may be seen and inspected by the court;" and therefore a day is given for the inspection accordingly;—and if the record be not in the same, but in another court, the party by whom its existence is asserted is commanded to bring it in (*y*). Afterwards on the day

writ of right, by a personal contest between the champions of the respective parties, armed with batons. It is copiously discussed in 3 Bl. Com. 337. As to *wager of law*, vide sup. p. 525.

(*v*) Co. Litt. 260 a.

(*x*) Vide sup. p. 383.

(*y*) See 2 Chitty, Pleading, 624, 625. It is to be observed that if it be a record of the same court, the record

itself must be produced; if a record of an inferior court, a transcript; to obtain which a writ of certiorari must be issued; but if a record of a superior court, the record of it is to be brought into Chancery by *certiorari*, and an exemplification of it afterwards sent by *mittimus* to the court where the action is pending. 1 Arch. Pr. 295, edit. 1844.

appointed, that party moves for judgment in his own favour, which may be opposed by his antagonist, and if the record is found to be in court, and to maintain the issue, judgment is then given for the party by whom its existence was asserted,—but in the opposite event, against him. In the same manner titles of nobility, as whether earl or no earl, baron or no baron, shall be tried by the king's patent only, which is matter of record (*z*), or, in the case of creation by writ, then by the record of parliament (*a*). [Also in case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours; for every league or treaty is of record (*b*). And also whether a manor be to be held in antient demesne or not, shall be tried by the record of *domesday* in the king's exchequer (*c*).]

[2. The trial by *certificate* is allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute. As therefore such evidence, if given to a jury, must have been conclusive, the law, to save trouble and circuitry, permits the fact to be determined upon such certificate merely. Thus, 1. If the issue be whether A. was absent with the king in his army, out of the realm in time of war, this shall be tried,] says Littleton, [by the certificate of the mareschal of the king's host in writing under his seal, which shall be sent to the justices (*d*). So if, in order to avoid an outlawry or the like, it was alleged that the defendant was in prison *ultra mare* at Bordeaux, or in the service of the mayor of Bordeaux,] which was then part of the dominions of the crown, [this should have been tried by the certificate of the mayor.]

(*z*) 6 Rep. 53; *Rex v. Knollys*, 1 Ld. Ray. 10.

(*a*) Co. Litt. 16 b; and note (3) by Harg.

(*b*) 9 Rep. 31.

(*c*) *Ibid.* It is to be observed that in the instances here mentioned of proof by the royal letters patent, by

treaty and by *domesday*, the word record is taken in a somewhat larger sense, and not in its strict technical meaning, according to which it refers exclusively to the proceedings of a court of justice.

(*d*) Litt. s. 102.

And in like manner, [we find that the certificate of the queen's messenger sent to summon home a peeress of the realm, was formerly held a sufficient trial of the contempt in refusing to obey such summons (*e*). 2. For matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder (*f*), upon a surmise from the party alleging it, that the custom ought to be thus tried; else it must be tried by a jury (*g*). As the custom of distributing the effects of freemen deceased, of enrolling apprentices,—or that he who is free of one trade may use another, if any of these or similar points come in issue. But this rule admits of an exception, where the corporation of London is party, or interested in the suit, as in an action brought for a penalty inflicted by the custom; for there the reason of the law will not endure so partial a trial, but this custom shall be determined by a jury, and not by the mayor and aldermen certifying by the mouth of their recorder (*h*). 3. In some cases the sheriff of London's certificate shall be the final trial, as if the issue be whether the defendant be a citizen of London or a foreigner (*i*), in case of plea of privilege to be sued only in the city courts. Of a nature somewhat similar to which is the trial of the privilege of the University when the chancellor claims cognizance] of a cause between two private persons, (as the practice of the courts at Westminster allows him to do), [because one of the parties is a privileged person (*k*). In this case the charters confirmed by act of parliament direct the trial of the question, whether a privileged person or no, to be determined by the certificate and notification of the chancellor under seal, to which it hath also been usual to add an affidavit of the

(*e*) *Bartue and the Duchess of Suffolk's case*, Dy. 176, 177.

(*f*) *Co. Litt.* 74; *Plummer v. Bentham*, 1 Burr. 248.

(*g*) *Bro. Ab. tit. Trial*, pl. 96.

(*h*) *Day v. Savadge*, Hob. 114.

(*i*) 2 *Rol. Ab.* 583.

(*k*) As to this privilege of the universities, *vid. sup.* p. 453.

[fact: but if the parties be at issue between themselves whether A. is a member of the university or no, on a plea of privilege, the trial shall be then by jury, and not by the chancellor's certificate, because the charters direct only that the privilege be allowed on the chancellor's certificate when the claim of cognizance is made by him, and not where the defendant himself pleads his privilege, so that this must be left to the ordinary course of determination.

4. In matters of ecclesiastical jurisdiction, as *marriage*, and of course *general bastardy*, and *orders*, these and other like matters shall be tried by the bishop's certificate (*l*).] As if [a man claims an estate by descent, and the tenant alleges the demandant to be a bastard, or if in dower the heir pleads no marriage, or if the issue in a *quare impedit* be whether or no the church be full by institution, all these, being matters of mere ecclesiastical cognizance, shall be tried by certificate from the ordinary. But in an action on the case for calling a man bastard, the defendant having pleaded in justification that the plaintiff was really so, this was directed to be tried by a jury (*m*), because, whether the plaintiff was found a general or special bastard, the justification will be good, and no question of special bastardy shall be tried by the bishop's certificate, but by a jury (*n*). For a special bastard is one born before marriage of parents who afterwards intermarry, which is bastardy by our law, though not by the ecclesiastical (*o*). It would therefore be improper to refer the trial of that question to the bishop, who, whether the child be born before or after marriage, will be sure to return or certify him legitimate (*p*). *Ability of a clerk* presented, *admission*, *institution*, and *deprivation of a clerk* (*q*), shall also be tried by certificate from the ordinary or metropo-

(*l*) Co. Litt. 74; Hill v. Barne, 2 Lev. 250.

(*m*) Hob. 213.

(*n*) Haward v. Duke of Suffolk, Dy. 79.

(*o*) Vide sup. vol. ii. p. 314.

(*p*) See Introd. to Great Charter, by Blackst. edit. Oxon. sub anno 1233.

(*q*) As to these matters vid. sup. pp. 77, 79, 87.

[litan, because of these he is the most competent judge (r); but *induction* (s) shall be tried by a jury, because it is a matter of public notoriety (t), and is likewise the corporal investiture of the temporal profits (u). *Resignation* of a benefice may be tried in either way,—but it seems most properly to fall within the bishop's cognizance (v). 5. The trial of all customs and practices of the courts shall be by certificate from the proper officers of those courts respectively; and what return was made on a writ by the sheriff or under-sheriff, shall be only tried by his own certificate (x). And thus much for those several issues or matters of fact, which are proper to be tried by certificate.

3. A third species of trial is that by *witnesses, per testes*, without the intervention of a jury. This is the only method of trial known to the civil law in which the judge is left to form in his own breast his sentence, upon the credit of the witnesses examined; but it is very rarely used in our law, which prefers the trial by jury before it, in almost every instance. Save only that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead, this being looked upon as a dilatory plea, is, in favour of the widow, and for greater expedition, allowed to be tried by witnesses examined before the judges; and, so saith Finch (y), shall no other case in *our* law.

4. The subject of our next inquiry will be the nature and method of the trial by jury, called also,] in technical language, [the trial *per pais*, or *by the country*, a trial that hath been used time out of mind in this nation,] and the origin of which is so remote, that it has not hitherto been satisfactorily traced (z).

(r) 2 Inst. 632; Show. Parl. c. 88; 2 Roll. Ab. 583.

(s) Vide sup. p. 80.

(t) Sir H. Sidney v. Bishop of Gloucester, Dy. 228.

(u) Vide sup. p. 87.

(v) 2 Rol. Ab. 583.

(x) 9 Rep. 31.

(y) L. 423. Sir E. Coke, however, mentions some others as occurring in real actions. 1 Inst. 6; 9 Rep. 30.

(z) Blackstone considers this mode of trial as having been "universally established among all the northern na-

This being the ordinary mode of trial in the English law, and at the same time one of the most important and celebrated of its institutions, [we shall proceed to the dissection and examination of it in all its parts.]

Here, however, it may be proper to explain, that there are several different forms of this proceeding. The first is a trial *at bar*; that is, a trial before the judges of the court in which the action is brought, sitting for that purpose in *banc* (*a*). This method is comparatively rare, and takes place only in causes of difficulty or importance; or where the crown is concerned in interest, and insists on its right to have the cause so tried. As between private parties it can take place only by special permission of the court. The second (which is the ordinary one) is the trial *at nisi prius*, which takes place (as formerly explained (*b*)) either before the chief justice, or some other judge, at the sittings for London or Middlesex, or before the judges of assize upon the different circuits;—and in the latter case as well as the former, it is conducted in effect before a

tions, and so interwoven in their very constitution, that the earliest accounts of the one give us also some traces of the other." 3 Bl. Com. 349. He also says, that it is mentioned in England as early as in the laws of Ethelred, for which he cites Wilk. Ll. Anglo-Sax. 117. He speaks, however, of the date of its first establishment among us as unknown, and the same uncertainty is confessed in a much later work, where though trial by jury is considered as having been in use among the Anglo-Saxons, it is remarked, that "no record marks the date of its commencement." Turner's Hist. Ang. Sax. vol. iii. p. 223. We must add, that when the Anglo-Saxon memorials are carefully scrutinized, we find them to be such as even to justify a doubt whether trial by jury (in any sense approaching to our use of

that term) did actually exist among us at any time before the Norman Conquest. See Hickes, Thes. Diss. Epist.; Hallam, Mid. Ag. vol. ii. p. 396; Reeves's Hist. Eng. Law, vol. i. pp. 24, 83. The most probable theory seems to be, that we owe the germ of this (as of so many other of our institutions) to the Normans (see Grand Coustum. lxxxiv.); and that it was derived by *them* from Scandinavia, where the judicial number of twelve was always held in great veneration. At the date of Bracton's work, temp. Hen. 3, it had taken among us (in substance) the shape which it now wears; but its rudiments appear as early as the reign of Hen. 2. (See Glanville.)

(*a*) Vide sup. p. 423.

(*b*) Vide sup. p. 422.

single judge only—it not being the practice for more than one judge to sit in the same cause, upon circuit. The third is a trial *before the sheriff*, which is a method adapted to the case where the action is for a liquidated debt or demand not exceeding 20*l.*, and where the trial is not likely to involve any difficult question of fact or law; it being provided by a late statute, 3 & 4 Will. IV. c. 42, s. 17, that in such cases the trial may, by leave of the court or any one of its judges, be held before the sheriff, or before the judge of any court of record for the recovery of debt within the county. But of these methods we propose to discuss the trial at nisi prius only, which is the ordinary and regular one—and shall only remark with respect to the rest, that they have in general the same incidents with this, particularly as regards the law of evidence, which applies to all the three alike.

When therefore an issue has been joined with a conclusion to the *country* (c), and the trial is intended to take place at nisi prius, the plaintiff's attorney is first to *make up and deliver the issue*; that is, to draw up a transcript on paper, of all the pleadings, and deliver it to the defendant's attorney, that he may ascertain it to be a correct copy of the pleadings which have actually taken place: which transcript is itself called *the issue*, its most material part being the question or issue in which the pleadings have terminated (d).

The next step is to *enter the proceedings on record*; which the plaintiff's attorney does by transcribing on a parchment roll the issue so delivered, and procuring the same to be passed (or entered) at the proper office of the court. This roll is called the *Nisi prius Record*.

The plaintiff's attorney then *sues out the jury process* (e), or process to enforce the appearance of the jury. This

(c) Vide sup. p. 580.

(d) As to the form of this transcript, see 1 Reg. H. T. 4 Will. 4; *Worthington v. Wigley*, 5 Dowl. 209.

(e) The form of the venire was slightly altered by 6 Geo. 4, c. 50, s. 13, but is substantially the same as it has been from the earliest times.

consists of two writs, called writs of *venire* and of *distringas*. The *venire* is directed to the sheriff of the county in which the action is *laid*, and commands him, according to a form that has been immemorially used (*e*), to cause a jury of men of his county to come before the court in which the action is brought, that is, the judges of such court in *banc*: before whom all actions therein brought were tried, in the antient times, prior to the introduction of the method of trying at *nisi prius*; but the jury is not, in fact, summoned under this writ, the practice of doing so having for ages past been disused. It is merely left with the sheriff, and by him afterwards returned to the court, with a *panel* or slip of parchment annexed, containing the names, abodes, and additions of a number of jurors, not less than forty-eight, nor exceeding seventy-two, taken from the jurors' book, which, by statute 6 Geo. IV. c. 50 (*f*), is to be annually made out in each county, in manner therein directed (*g*); and it is provided by the same statute, that the same names shall be returned upon *all* the *venires* for trial of issues at the same assizes or sittings. The *distringas* (called in the Common Pleas a *habeas corpora*), which is supposed to be issued after the *venire*, but is in fact issued at the same time, is founded on a supposed and fictitious neglect of the jurors to attend upon the *venire*, and requires them to be distreined upon, and made to attend before the court in *banc* on an ulterior day, to try the cause, or (alternatively) to attend before the court at *nisi prius*, if the judge at *nisi prius* shall first

(*e*) Where the case is to be tried in the county palatine of Lancaster or Durham, no *venire* can be issued from the courts of Westminster, but it becomes necessary to sue out a writ of *mittimus* to the judges of the palatine court, directing them to issue jury process. Lush's Praet. 429. As to jury process in counties palatine, see 6 Geo. 4, c. 50, s. 17.

(*f*) It is by this statute that the whole practice relative to the constitution of juries is now mainly regulated.

(*g*) This book is made up from lists returned from each parish, of persons qualified to serve as jurors. As to the expenses of which list, see 7 & 8 Vict. c. 101, s. 60.

come on some intervening day specified, into the county where the venue is laid. And it is under the authority of this latter writ (which has annexed to it the same panel of jurors as are annexed to the *venire* (*h*)), and under the alternative direction it contains with respect to the judge of *nisi prius*, that the jurors are summoned and the cause eventually tried (*i*). In order, besides, to give to the defendant the opportunity of informing himself as to the jurors by whom the cause may be tried, it is provided by the statute just mentioned, that the sheriff shall cause to be made out an alphabetical list of the names, abodes, and additions of the several jurors in the panels, and shall keep such list in the office of the under-sheriff for seven days at least before the trial; and the parties in any cause to be tried at the same assizes or sittings, shall have full liberty to inspect the same (*j*). But if the trial is to be by what is called a *special jury* (the resort to which, in lieu of a common jury, is at the option of either plaintiff or defendant (*k*)), it becomes necessary, before the *distringas* can be executed, to have a *special jury struck*; for which purpose the attorneys on both sides, and the under-sheriff or his agent, attend before the proper officer of the court with the *special jurors' list*, which, by virtue of the same statute, the sheriff is directed annually

(*h*) See *Rogers v. Smith*, 1 Ad. & El. 772; *Archbold v. Smith*, 1 Mee. & W. 742.

(*i*) Vide sup. pp. 424, 566. The award of the *distringas* upon the *nisi prius* record is in the following terms:—"Afterwards on the — day of —, in the year —, the jury between the parties aforesaid is respite here until the — day of —, unless — (the judges of "*nisi prius*") shall first come on the — day of —," &c. These words, *nisi prius venerint*, were antiently inserted in the *venire*, though it does not contain them now, and have given

name to the mode of trial in question.

(*j*) Sect. 19.

(*k*) 6 Geo. 4, c. 50, s. 30. By Reg. Gen. H. T. 1 Vict. no rule for a special jury shall be granted on behalf of the defendant (where notice of trial has been given), unless the application for it is made more than six days previously. And by 6 Geo. 4, c. 50, and 3 & 4 Will. 4, c. 42, s. 35, the party who applies for a special jury shall pay the costs thereof, whatever the event of the cause, unless the judge certifies upon the back of the record, that the same was a cause proper to be tried by a special jury.

to make out from the jurors' book; and from among those described in that book as esquires, or as persons of higher degree, or as bankers or merchants: and tickets corresponding with the names of the jurors on the list, being put into a box and shaken, the officer takes out forty-eight;—to any of which names either party may object for incapacity—and supposing the objection to be established, another name is substituted. The list of forty-eight is next, and at a subsequent period, *reduced* by striking off, before the same officer, the names of such twelve jurors as either party shall in his turn wish to have removed—and the names of the remaining twenty-four are then inserted in the writ of *distringas* as the jurors to be summoned for the cause, which persons are then summoned by the sheriff accordingly (*l*).

The next step for the plaintiff's attorney to take, provided he has previously given *notice of trial* (*m*) (a notice he is entitled to give as early as the delivery of the issue), is to *enter the cause for trial* (*n*). For this purpose the venire and *distringas*, with their panels, having been annexed to the *nisi prius* record, that record is to be taken to the judge's marshal and entered with him. If it be not so entered, the cause cannot be tried. [Therefore it is in the plaintiff's breast to delay any trial by not carrying down the record, unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on

(*l*) It is provided, however, by sect. 33 of the same act, that the parties may, by consent, have a special jury nominated, in the mode accustomed before the act. According to that mode, the proper officer selected from the jurors' book such forty-eight as he pleased. Lush's Pract. 477; 3 Bl. Com. 358.

(*m*) The practice of the courts requires fourteen days' notice of trial, where the venue is laid in London or

Middlesex, and defendant resides above forty miles from London; but if he resides within forty miles, then eight days. In a country cause, the notice required is ten days, wherever defendant resides. Lush's Pract. 436. As to notice of trial, see *Farmer v. Mountfort* or *Mountford*, 1 Dowl. N. S. 366; *Shepherd or Shepheard, v. Thompson*, *ibid.* 345.

(*n*) As to entry of cause for trial, see *R. v. Ray*, 2 Dowl. N. S. 232.

[the trial, giving proper notice to the plaintiff, which proceeding is called the *trial by proviso*, by reason of the clause there inserted in the sheriff's venire, viz. *proviso*, provided that if two writs come to your hands (that is, one from the plaintiff and another from the defendant), you shall execute only one of them.] But this practice has been long much disused; it having been provided by the statute 14 Geo. II. c. 17, [that if after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit.]

[Let us now pause awhile, and observe with Sir Matthew Hale (o), in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth, beyond any other method of trial in the world. For, first, the *person returning* the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty.] Next, as to the manner of the return, it is, as we have seen, so managed, that [the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connexions, and relations, that so they may be challenged upon just cause.] [Thirdly, as to the *place* of their appearance: which in causes of weight and consequence is at the bar of the court, but in ordinary cases at the assizes held in the county where the cause of action arises, and the witnesses and jurors live; a provision most excellently calculated for the saving of expense to the parties. For though the preparation of the causes in point of pleading is transacted at Westminster, whereby the order and uniformity of proceeding is preserved throughout the kingdom, and multiplicity of forms is prevented; yet this is no great charge

(o) Hist. C. L. c. 12.

[or trouble, one attorney being able to transact the business of forty clients. But the troublesome and most expensive attendance is that of jurors and witnesses at the trial, which therefore is brought home to them in the county where most of them inhabit. Fourthly, the *persons before whom* they are to appear, and before whom the trial is to be held, are the judges of the superior courts, if it be a trial at bar, or the judges of assize delegated from the courts at Westminster by the crown, if the trial be held in the country; persons whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being strangers in the county is of infinite service in preventing those factions and parties which would intrude in every cause of moment were it tried only before persons resident on the spot, as justices of the peace and the like.] [And as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected and their judgments blended together, as they are interchangeably courts of appeal or advice to each other. And hence their administration of justice and conduct of trials are consonant and uniform, whereby that confusion and contrariety are avoided which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment.

But let us now return to the assizes,] where (all previous steps having been regularly settled) we will suppose the cause to be called on in court. The *nisi prius* [record is then handed to the judge to peruse, and observe the

[pleadings, and what issues the parties are to maintain and prove; while the jury is *called* and *sworn*.]

If the jury is to be a common one, the calling of it consists in successively drawing out of a box, into which they have been previously put (*o*), the names of the jurors on the panels annexed to the *nisi prius* record at that assizes or sittings (which names, it will be recollected, are in each case the same); or, on the other hand, if the jury is to be a special one, it consists in calling over the names from the panel annexed to the *distringas* in the particular cause; and in either case, the twelve (*p*) whose names are *first* called, and who appear, are sworn as the jury, unless some just cause of challenge or excuse with respect to any of them shall be brought forward. It sometimes happens, however, that on the application of one of the parties, the court has ordered that a view should be had by certain of the jurors, of the messuages, lands, or place in question; [in which case, six or more of the jurors returned, to be agreed on by the parties] or nominated by the sheriff, [shall be appointed by special writ of *distringas* or *habeas corpora*, to have the matter in question shown to them by two persons named in the writ (*q*), and then such of the jury as have had the view, or so many of them as appear,

(*o*) 6 Geo. 4, c. 50, s. 26.

(*p*) In this patriarchal and apostolical number of twelve, of which a jury always consists, "Lord Coke has discovered," says Blackstone, "an abundance of mystery;" see Co. Litt. 155. And he proceeds to remark, that Dr. Hickes, who attributes the introduction of this number to the Normans, (vide 3 Bl. Com. 366, *n.*) tells us that among the inhabitants of Norway, from whom the Normans as well as the Danes were descended, a great veneration was paid to the number *twelve*. "*Nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero*

secreta quædam esset religio." Vide Hickes, Diss. Epist. 49. Mr. Hallam also (Hist. Mid. Ag. vol. ii. p. 401) remarks upon the veneration with which this number was regarded in Scandinavia generally, and cites Spelman's Glossary, voce *Jurata*; Du Cange, voce *Nembda*; Edinb. Review, vol. xxxi. p. 115; which he characterizes as "a most learned and elaborate essay." He observes, too, that Spelman has produced several instances of the regard paid to twelve in the early German laws.

(*q*) 6 Geo. 4, c. 50, s. 23.

[shall be sworn on the inquest, previous to any other jurors.]

After the jurors have appeared, they are liable before they are sworn to be [*challenged* by either party. Challenges are of two sorts—challenges to the *array*, and challenges to the *polls* (*r*).

Challenges to the array are an exception at once to the whole panel, in which the jury are arrayed, or set in order, by the sheriff in his return (*s*); and they may be made upon account of partiality or some default in the sheriff, or his under officer, who arrayed the panel,] as if the sheriff be a party in the suit, or related by either blood or affinity to either of the parties. [Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction, of either party, this is a good cause of challenge to the array (*t*).]

And a challenge may be either by way of *principal* challenge, or a challenge *to the favour*; the former being

(*r*) As to challenges, vide *R. v. Edmonds*, 4 B. & Ald. 471; *Mayor of Carmarthen v. Evans*, 10 Mee. & W. 274.

(*s*) It is considered as very doubtful, if a challenge to the array can be made when the jury is *special*. 1 Arch. Pr. by Chitty, p. 351.

(*t*) Formerly, if a lord of parliament had a cause to be tried, and no *knight* was returned upon the jury, it was a cause of challenge to the array. (Co. Litt. 156 a; Selden, Baronage, ii. 2.) But this objection is now taken away; see 24 Geo. 2, c. 18; 6 Geo. 4, c. 50, s. 28. Moreover, it was long necessary that some of the jury should be returned from the neighbourhood where the cause of action was laid in the declaration, so that if none were returned at least from the same hundred, the array might be challenged for want of *hundredors*, an objection founded on the

early practice of our law, by which the jurors, in the origin of the institution of trial by jury, were summoned altogether *de vicineto*, and were indeed in the nature of *witnesses*, rather than judges. But the necessity for the *hundredors* also was by successive statutes gradually abolished; vide 27 Eliz. c. 6; 4 Ann. c. 16; 24 Geo. 2, c. 18. And see, as to criminal cases, 6 Geo. 4, c. 50, s. 13. The array might also formerly be challenged if an *alien* were party to the suit, and if (after application made to the court for that purpose) the sheriff did not return a jury *de medietate linguæ*, that is, a jury one half of which consisted of aliens, supposing so many to be found in the place. And this trial by a jury *de medietate* is still allowed in trials for felony or misdemeanor, but no longer in a civil action; see 6 Geo. 4, c. 50, ss. 3, 47.

on one of the direct grounds above described; the latter, on grounds that imply only a probability of bias or partiality, as that the son of the sheriff has married the daughter of the adverse party, or the like (*u*); and there seems to be this practical difference between them, that the first, if sustained in point of fact, must be allowed as of course, the allowance of the latter is matter of judgment and discretion only (*x*). If the challenge be controverted by the opposite party, it is to be left to the determination of two persons, to be appointed by the court (*y*); and if these persons, called *triors*, decide in favour of the objection, the array is to be quashed, and a new jury impanelled by the coroner (*z*), who acts in this, as in many other instances, as substitute for the sheriff, in executing process, where he is deemed an improper person (*a*).

[Challenges to the polls, *in capita*, are exceptions to particular jurors, and seem to answer the *recusatio judicis* in the civil and canon laws; by the constitution of which, a judge might be refused upon any suspicion of partiality (*b*). By the laws of England also, in the times of Bracton (*c*) and Fleta (*d*), a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged (*e*). For the law will not suppose a possibility of bias or favour in a

(*u*) Co. Litt. 156 a.

(*x*) Ibid.; et vide 3 Bl. Com. 363.

(*y*) It is said, however, that a principal challenge may be tried by the court itself without the intervention of *triors*, Arch. Pr. by Chitty, p. 354.

(*z*) Newman v. Edmunds, 1 Bulst. 114; 2 Hale, P. C. 275; R. v. Edmunds, 4 B. & Ald. 471. If at the time of awarding the *venire*, the sheriff is known not to be indifferent, the *venire* is not directed to him, but to the coroners. If any exception lies to the coroners, the *venire* shall be directed to two clerks of the court, or two per-

sons of the county named by the court and sworn. And these two, who are called *elisors* or electors, shall indifferently name the jury, and their return is final, no challenge being allowed to their array. 3 Bl. Com. 354; Fortesc. de Laud. LL. c. 25; Co. Litt. 158.

(*a*) 3 Bl. Com. 364; et vide sup. p. 37.

(*b*) Cod. 3, 1, 16; Decretal. l. 2, t. 28, c. 36.

(*c*) L. 5, c. 15.

(*d*) L. 6, c. 37.

(*e*) Co. Litt. 294.

[judge who is already sworn to administer impartial justice,] and whose conduct upon the judgment seat is under the immediate check of public observation. [And should the fact at any time prove flagrantly, such as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct (f).

But challenges to the polls of the jury, who are judges of fact] only, and are merely private persons, do not fall under the same principle, and are consequently allowed. They [are reduced to four heads by Sir E. Coke (g),—*propter honoris respectum*, *propter defectum*, *propter affectum*, and *propter delictum*.

1. *Propter honoris respectum*, as if a lord of parliament be impanelled on a jury, he may be challenged by either party,] or he may excuse himself as exempted by law (h). [2. *Propter defectum*, as if a jurymen be an alien born, this is defect of birth (i),] in connection with which we may notice the defect of sex, no female being capable of serving on a jury (j). [But the principal deficiency is defect of estate sufficient to qualify a man to be a juror.] This formerly depended on a variety of statutes (k), but now on the 6 Geo. IV. c. 50, alone. By this

(f) Vide sup. vol. ii. p. 492.

(g) Co. Litt. 156 b.

(h) 6 Geo. 4, c. 50, s. 2. It has been doubted whether, since the peerage has been thus made matter of *exemption*, it is any longer matter of *challenge* by the parties. Vide Arch. Pr. by Chitty, p. 352. But it is apprehended that this cannot take away their right of challenge.

(i) Ibid. s. 3. See as to the challenges of *alienage* to a special juror, R. v. Sutton, 8 B. & C. 417.

(j) Except in the case of a jury of matrons upon the writ *de ventre inspi-*

ciendo. Ibid. s. 1, and 3 Bl. C. 362.

(k) It appears from Blackstone (3 Bl. C. 362), that by stat. Westm. 2, 13 Edw. 1, c. 38, the general qualification for juries in assizes was 20s. by the year, which was increased to 40s. by 21 Edw. 1, st. 1, and 2 Hen. 5, st. 2, c. 3. This was doubled by 27 Eliz. c. 6, which required an estate of freehold to the yearly value of 4l. at the least. But the value of money greatly decreasing, the qualification was raised by a temporary act, 16 & 17 Car. c. 3, to 20l. per ann., and on the expiration of that act was after-

statute the qualification of a juror, generally, is as follows : He must be between twenty-one and sixty years of age, and must have within the county in which he resides, and in which the action is to be tried, in his own name, or in trust for him, 10*l.* by the year above reprises, in lands or tenements of freehold, copyhold or customary tenure, or of ancient demesne, or in rents issuing out of such lands or tenements, or in such lands, tenements and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or he must have within the same county 20*l.* by the year, above reprises, in land or tenements, held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives; or he must be a householder, rated or assessed to the poor rate, or to the inhabited house duty in Middlesex, on a value of not less than 30*l.*, or (in any other county) on a value of not less than 20*l.*; or he must occupy a house containing not less than fifteen windows (*l*). And the want of any such qualification is a ground of a challenge (*m*). [3. Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. This may be either a *principal* challenge or *to the favour*;] the distinction between which has been already explained in reference to challenges to the array.

wards fixed by 4 & 5 W. & M. c. 24, at 10*l.* per ann., and 6*l.* in Wales, of freehold land or copyhold; which was the first time that copyholders were allowed to serve on juries in the superior courts. In addition to which it was afterwards provided, by 3 Geo. 2, c. 25, that any leaseholder for 500 years absolute, or any term determinable on a life or lives, of the clear yearly value of 20*l.* over and above the rent, should be qualified.

(*l*) The general qualification prescribed by this act applies not only to jurors impanelled to try issues, but to jurors on writs of inquiry before sheriffs. It does not apply, however,

to the jurors in towns corporate or counties corporate, possessing jurisdictions of their own; the panels of whose juries are to be prepared in manner before accustomed (sect. 50); and as to London jurors, returned to try issues out of the superior courts, the act provides a qualification different from the general one, viz. that a juror must be a householder or the occupier of a shop, warehouse, counting-house, chambers or office, for the purpose of trade or commerce, within the city, and have lands, tenements or personal estate of the value of 100*l.* (*lbid.*)

(*m*) 6 Geo. 4, c. 50, s. 27.

As regards challenges to the polls, it is laid down as a cause of principal challenge—[that a juror is of kin to either party within the ninth degree(*n*); that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him.] And that on the other hand, challenges to the favour are where the objection is founded on [some probable circumstances of suspicion, as acquaintance and the like(*o*).] Challenges of either kind are disputed, like those to the array, by *triors*; the practice as to whom, in the case of challenges to the polls, is stated as follows. [The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest(*p*).]

4. Challenges *propter delictum* are for some crime or misdemeanor that affects the juror's credit, and renders him infamous.] As for an attainder of treason or felony; unless he shall have obtained a free pardon; or for outlawry(*q*).

Besides these challenges(*r*), which are exceptions against

(*n*) See *Onions v. Naish*, 7 Price, 263; *Hewitt v. Ferneley*, *ibid.* 234.

(*o*) *Finch*, L. 401. It is remarkable that in the *nembda* or jury of the antient Goths, there was a distinction similar to ours, as to the nature of the challenges: "*Licebat palam excipere, et semper ex probabili causa tres repudiari; etiam plures ex causa pręgnanti et manifesta.*"—*Stiern.* l. 1, c. 4.

(*p*) *Co. Litt.* 158. If the challenge is a principal one, however, it may be tried by the court, without the intervention of triors, and the juror himself may be examined as to the matter of challenge, if it do not tend to his discredit. *Arch. Pr.* by Chitty, 355.

(*p*) 6 Gen. 4, c. 50, s. 3.

(*r*) It is to be observed, that the

the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matters of *exemption*; whereby their service is *excused*, and not *excluded*. These exemptions formerly depended on various statutes, customs, and charters, but now depend on the 6 Geo. IV. c. 50, alone. The persons exempted are as follows: all peers; judges of the superior courts; clergymen; Roman Catholic priests, who have qualified; dissenting ministers, whose meeting is duly registered, and who follow no secular occupation but that of schoolmaster, and who produce the certificate of some justice of the peace of their having qualified; serjeants, barristers, and advocates actually practising; attorneys, solicitors, and proctors actually practising, and taking out their certificates; officers of all courts of law or equity, or of ecclesiastical or admiralty jurisdiction, actually exercising their duties; coroners, gaolers, and keepers of houses of correction; physicians, surgeons and apothecaries, duly admitted to practise, and practising; officers of the royal army or navy on full pay; licensed pilots and masters of vessels in the buoy or light service, licensed by the Trinity House, or lord warden of the cinque ports; royal household servants; officers of customs and excise; sheriffs' officers; high constables, and parish clerks (s).

If a sufficient number of jurors do not appear, or if by means of challenges a sufficient number of unexception-

case of a formal challenge, whether to the array or the polls, has now become infrequent; for where the sheriff is not indifferent, the venire may be directed in the first instance to the coroner, as before mentioned; and supposing it to be directed to the sheriff, this will be a sufficient ground not only for challenge, but for moving in arrest of judgment after the verdict. (Archb. Pr. by Chit. 351.) So in case of any ob-

jection to a particular juror, the usual course now is, simply to intimate the objection to the proper officer of the court, who, unless the matter be disputed on the other side, will refrain from calling him. So that the learning of challenges (though still of great importance) is rarely illustrated by the modern practice of the courts.

(s) 6 Geo. 4, c. 50, s. 2.

able ones do not remain, [either party may pray a *tales*. A *tales* is a supply of *such* men as are summoned upon the first panel, in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar, if the jurors make default. But at the assizes, or sittings at nisi prius,] the judge is empowered, by the 6 Geo. IV. c. 50, s. 37, at the request of either party, to award a *tales de circumstantibus* (*t*), that is, to command the sheriff to return so many other men duly qualified as shall be present, or can be found, to the number required for making up a full jury; and to add their names to the former panel. But in the case of common jurors (of whom seventy-two are usually returned on the same common jury panel (*u*)) it happens of course but rarely that the whole are exhausted so as to make a *tales* necessary; and in special jury causes the deficiency is, by the same statute, directed to be made up from the common jury panel, if a sufficient number can be found (*v*). But if such number be not found, there is then to be a *tales de circumstantibus* in manner before directed. No *tales*, however, can be awarded in a special jury cause, at the instance of the plaintiff, unless the defendant concurs (*w*).

The necessary number of twelve qualified persons being at length obtained, they are then separately sworn “well and truly to try the issue between the parties, and a true verdict to give according to the evidence;” and hence they are denominated the “jury,” *jurata* (*x*), and the “jurors,” *juratores* (*y*).

(*t*) F. N. B. 166; Reg. Brev. 179.

(*u*) Vide sup. p. 589.

(*v*) 6 Geo. 4, c. 50, s. 37.

(*w*) Arch. Pr. by Chitty, 325.

(*x*) As to the *affirmation* in lieu of oath in case of Quakers, &c. see 3 & 4 Will. 4, c. 49, and c. 82; 1 & 2 Vict. c. 77; 6 & 7 Vict. c. 85, s. 2.

(*y*) Blackstone remarks that the

selecti judices of the Romans bore in many respects a remarkable resemblance to our juries,—for they were first returned by the prætor; then their names were drawn by lot, till a certain number was completed; then the parties were allowed their challenges; next they struck what we call a *tales*; lastly, the judges, like our jury, were

[The jury are now ready to hear the merits; and to fix their attention the closer to the facts which they are impanelled and sworn to try, *the pleadings are opened* to them by counsel on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required upon that side which affirms the matter in question (z); in which our law agrees with the civil (a): "*ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum-negantis probatio nulla sit.*" The opening counsel briefly informs them what has been transacted in the court above; the parties, the nature of the action, the declaration, the plea, replication, and other proceedings; and lastly, upon what point the issue is joined, which is there sent down to be determined. Instead of which formerly (b) the whole record and process of the pleadings,] then in Latin, [was read to them in English by the court, and the matter in issue clearly explained to their capacities. The nature of the case, and the evidence intended to be produced, are next laid before them by counsel also on the same side; and when their evidence is gone through, the advocate on the other side opens the

sworn. (Ascon. in Cic. Verr. 1, 6; 3 Bl. Com. 366.) He also remarks a learned writer of our own, Dr. Pettin-gal. hath shown in an elaborate work (pub. A. D. 1769) so many resemblances between the *δικασται* of the Greeks, the *judices selecti* of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former. As to the derivation of our juries, however, vide sup. p. 587.

(z) *Calder v. Rutherford*, 3 Brod. & Bing. 302; *Evans v. Birch*, 3 Camp. 10. But there are cases in which the law presumes the affirmative, and where consequently the negative must be proved by the party asserting the negative. See *Williams v. East India*

Company, 3 East, 192. And it is a general rule, that where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. As to the presumptive evidence sufficient in such cases, see 2 Roll. Rep. 461; *Dickson v. Evans*, 6 T. R. 57; *Wilson v. Hodges*, 2 East, 312; *R. v. Harborne*, 2 A. & E. 540; *Randle v. Lory*, 6 A. & E. 218; *Nepew v. Doe*, d. Knight, 2 Mee. & W. 910; *Sillick v. Booth*, 1 You. & C. N. C. 117. Et vide as to the particular case of tenants for life, or *cestuy que vies*, stat. 19 Car. 2, c. 6; 6 Ann. c. 18.

(a) *Ff.* 22, 3, 2; *Cod.* 4, 19, 23.

(b) *Fortesc.* c. 26.

[adverse case, and supports it,] if its nature so require, [by evidence; and then the party which began is heard by way of reply.] But no reply is allowed unless evidence be given in answer to the case first stated (*b*).

The nature of the present work is not adapted to a full disquisition on the numberless niceties and distinctions which attend the law of evidence (*c*). We must confine ourselves to a few observations on the nature of evidence in general, and a notice of some of its leading rules and maxims.

Proofs, or evidence, (for the terms are generally used as synonymous,) are either *written* or *parol*. The former consist of records, deeds, or other writings, (which may be either of a public or private description (*d*)); the latter, of witnesses personally appearing in court, and sworn (*e*) to the truth of what they depose.

With respect to witnesses, [there is a process to bring them in by writ of *subpœna ad testificandum* (*f*);] which commands them, laying aside all excuses, and on pain of forfeiting 100*l.*, to appear at the trial, and give their evidence. And it may contain a clause of *duces tecum*, requiring them to bring at the same time all such deeds or writings in their possession or power as the party who issues the subpœna may think material for his purpose.

(*b*) There is an exception however to this in the case of the crown, which is always entitled to reply.

(*c*) There exist two admirable treatises on this subject; those of Mr. Phillips and of Mr. Starkie.

(*d*) As to the admissibility in evidence of letters of an agent, *Jones v. Shears*, 4 A. & E. 832; of entries in parish books, *Taylor v. Devey*, 7 A. & E. 409; of an antient survey of manor, *ibid.* 617; of books of treasurer of charity, *Doe d. Graham v. Hawkins*, 2 A. & E. N. S. 212; of judgments, *Christy v. Tancred*, 9 Mee. & W. 438;

of public books not judicial, *Jewison v. Dyson*, *ibid.* 540; *Rowe v. Brenton*, 8 B. & C. 743; of title deeds, *Wollaston v. Hakewill*, 3 Man. & Gr. 297.

(*e*) Quakers, &c. are allowed to *affirm*, without oath. See statutes cited *supra*, p. 602, note (*x*). The former statutes on this subject were 7 & 8 Will. 3, c. 34; 22 Geo. 2, c. 46, ss. 36, 37; 22 Geo. 3, c. 30; 9 Geo. 4, c. 32.

(*f*) As to subpœna, *Garden v. Creswell*, 2 Mee. & W. 319; *Scholes v. Hilton*, 10 Mee. & W. 15.

In the event of the non-attendance of a person so subpoenaed, and his inability to show any lawful ground of excuse, (such as that of dangerous illness,) he is considered as having committed a contempt of court, and is liable to an attachment, (a species of criminal process,) under which he may be punished for such contempt. And an action will also lie against him, at suit of the party grieved, to recover compensation for any loss that may be occasioned by the non-attendance (*g*). [But no witness, unless his reasonable expenses] for the whole period of his attendance, *eundo, morando, et redeundo*, [are tendered him, is bound to appear at all; nor if he appears, is he bound to give evidence till such charges are actually paid him;] and he is also protected during the same period from any arrest for debt (*h*). If it be ascertained beforehand that a person required as a witness will be unable to attend the trial from permanent sickness or infirmity, or absence in parts beyond the court's jurisdiction, the court is empowered, by 1 Will. IV. c. 22, to issue a commission for his examination at any place out of the jurisdiction, or to order his examination upon interrogatories or otherwise, at any place within the jurisdiction, (as the case may require); and such examination may afterwards be read in evidence at the trial, provided the witnesses be dead, or (in case of sickness or infirmity) provided his disability still continues; but otherwise not without consent of the party against whom it is offered (*i*).

[All witnesses, of whatever religion (*k*) or country, that

(*g*) An action will also lie on the stat. 5 Eliz. c. 9, to recover a penalty of 10*l.* at the suit of the party grieved. But this proceeding is not an usual one. As to the action at common law for non-attendance, see *Davis v. Lovell*, 1 Horn & Hurl. 451. As to attachment for non-attendance, *Scholes v. Hilton*, *ubi sup.*; *Chapman v. Davis*, 1 Dowl. N. S. 239.

(*h*) *Meekins v. Smith*, 1 H. Bl. 636.

where it was laid down, that the same privilege applied to *all* persons (whether witnesses or not) who had *bonâ fide* occasion to attend.

(*i*) 1 Will. 4, c. 22, s. 10. As to commissions to examine witnesses, see *Clay v. Stephenson*, 7 A. & E. 185.

(*k*) An atheist is not competent, 1 Stark. Ev. 81, and the authorities there cited.

[have the use of their reason (*l*), are to be received and examined.] To this, indeed, there were formerly two exceptions. For persons that were *infamous*, that is, of such character that they might be challenged as jurors *propter delictum* (*m*), were wholly inadmissible as witnesses; and persons *interested* in the testimony they were to give (however slight that interest might be) were also incompetent to be heard as witnesses on the side of the question to which their interest inclined. But the principle of absolute exclusion in these cases, though once among the most settled peculiarities of the English law, has been eradicated from it by a recent act of parliament, and the objection is now admissible only as affecting the *credibility*, and not the *competency*, of the witness; it being provided by 6 & 7 Vict. c. 85, that no person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence either in person, or by deposition, on any issue or inquiry civil or criminal, but shall be admitted notwithstanding he may have an interest in the matter in question, or in the event of the trial or proceeding, and notwithstanding that he may have previously been convicted of any crime or offence. It is declared, however, that this provision is not to render competent any party to the suit or proceeding individually named in the record (*n*), or any person on whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the *husband* or *wife* of such persons respectively.

The oath is administered to the witness in general upon the New Testament, but to the believers in other religions than the Christian, in the forms appropriate to their creed; and by 1 & 2 Vict. c. 105, it is declared and enacted that

(*l*) A child too young to understand the nature of an oath, or an adult unable from mental infirmity to understand it, is incompetent. *Ibid*.

(*m*) 3 Bl. Com. 370.

(*n*) The act here adds, "or any lessor of the plaintiff, or tenant in ejectment, or the person in whose right a cognizance may be made in replevin."

in all cases in which an oath is administered either to a jurymen or a witness, or to a deponent in any proceeding civil or criminal, in any court of law or equity, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided it be administered in such form and with such ceremonies as he may declare to be binding, and in case of false swearing he may be convicted of perjury as well as when administered in the form and with the ceremonies most commonly adopted.

A witness is not bound to answer any question that tends to expose him to criminal punishment or penal liability (*o*). But by 46 Geo. III. c. 37, it is declared and enacted that he cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to expose him to a penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he *owes a debt*, or is otherwise subject to a civil suit.

A counsel, attorney or solicitor (*p*) also is not bound or even at liberty to divulge the secrets of the cause with which he may have become confidentially intrusted; nor can official persons be called upon to disclose any matter of state, the publication of which may be prejudicial to the community. But the law recognizes no other privilege in this matter; and compels all other professional persons, whether physicians, surgeons, or divines, to divulge the secrets (if relevant to the issue), with which they have become professionally acquainted; and will not allow even a servant or private friend to withhold a relevant fact,

(*o*) Stark. Ev. 136.

(*p*) Rex v. Duchess of Kingston, 11 St. Tr. 246; Wilson v. Rastall, 4 T. R. 753; Cromack v. Heathcote, 2 Brod. & Bing. 4; Bramwell v. Lucas, 2 B. & C. 745; Griffith v. Davies, 5

B. & Ad. 502; Marston v. Downes, 1 A. & E. 31; Doe d. Strode v. Seaton, 2 A. & E. 171; Turquand v. Knight, 2 Mee. & W. 98; Doe d. Peter v. Watkins, 3 Bing. N. C. 421.

though of the most delicate nature, and communicated to him in the strictest confidence (r).

[One witness, if credible, is *sufficient* evidence to a jury, of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy, and therefore does not always demand the testimony of two, as the civil law universally requires. “*Unius responsio testis omnino non audiatur* (s).”] To extricate itself from which inconvenience the modern practice of the civil law courts has resorted to an expedient more ingenious than satisfactory. [For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though never so clear and positive, *semi-plena probatio* only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have one only to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and administer to him what is called the *suppletory* oath,—and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one.] The law of England, on the other hand, pursues in both respects an opposite, and, as it should seem, more reasonable course; for while it [permits one witness to be sufficient where no more are to be had,] it avoids at the same time all temptation to perjury, by laying it down as an invariable rule, [that “*nemo testis esse debet in propria causa*.”]

After the examination of the witness by the party for whom he is called, which is termed his *examination in chief*, he is subject to *cross-examination* by the opposite party,—which being concluded, he may then be *re-examined* by the party calling him, in reference to any matters suggested by the cross-examination (t). The evi-

(r) *Wilson v. Rastall*, ubi sup.;
Rex v. Duchess of Kingston, ubi sup.;
Vaillant v. Dodemead, 2 Atk. 524.

(t) As to cross-examination and
 re-examination, vide *Prince v. Samo*,
 7 A. & E. 627.

(s) Cod. 4, 20, 9.

dence he has given, thus passes through a close and severe scrutiny, while on the other hand it receives all the support and protection which the interests of justice require.

The object of the cross-examination, it should be observed, may not only be to obtain new facts not before elicited, but to impeach the character of the witness for veracity. He may therefore be asked if he has not given a contrary account of the same matter on a former occasion, and if he denies this, proof may then be given, *aliunde*, that he has done so. Evidence may also be offered to prove that he has been convicted of perjury, or the like, or generally that he is of such a character as not to deserve to be believed upon his oath. But no evidence can be given against him of particular acts of misconduct, for this would be to engraft another trial upon that which is already before the jury, and not only perplex the administration of justice, but put the witness himself to the unfair disadvantage of being assailed on charges of which he had no previous notice (*u*).

The nature of the evidence itself, whether obtained from witnesses, or from written instruments, is the next point that naturally presents itself for consideration, and the main principles of the law connected with this subject shall here be briefly stated.

First, then, we may remark, that no evidence is necessary as to matters of which the court will take judicial notice,—as of the existence of a war in which the country is engaged, and which has been recognized in acts of parliament (*x*); or of matters which the law presumes,—as that a man is innocent till the contrary be shown,—that all official acts have been done in due form,—or that a man proved to have been living, within a certain period, not exceeding the known limits of longevity, is still in

(*u*) 1 Stark. Ev. 145; Queen's case, 2 Brod. & Bing. 299; Spencely v. De Willot, 7 East. 108; Carpenter v. Wall, 11 A. & E. 803.

(*x*) R. v. De Berenger, 3 M. & S. 67. See Russell v. Dickson, 6 Bing. 442; Brune v. Thompson, 2 G. & D. 110.

existence (*x*). Nor is evidence in general necessary with respect to matters which the opposite party has admitted to be true (*y*); and it is of course always dispensed with, as to matters upon which an admission has been made for the express purpose of being used at the trial. And in reference to this subject we may remark, that by a recent rule of the courts (*z*), either party may, after plea pleaded, and within a reasonable time before the trial, call on his adversary to admit, for the purpose of the trial, the execution of any written or printed documents which the former party intends to produce in evidence, and if the judge before whom the application is discussed, thinks it a reasonable one under the circumstances of the case, and the party so called upon refuses an admission, the costs of proving the document will be thrown upon such party, whatever may be the result of the cause. Again, it is a fundamental rule, that no evidence is admissible except upon the point in issue (*a*). [Therefore in an action of debt, where the defendant denies his bond, by the plea of *non est factum*, and the issue is whether it be the defendant's deed or no, he cannot give a release of this bond in evidence; for that does not destroy the bond,] but shows only that it is discharged; and therefore does not support his side of the issue, which is the allegation that the bond alleged against him is not his deed. Instead of *non est factum*, he should have pleaded the release.

Another rule of the same general nature is, that none but the best evidence shall be adduced (*b*); by which we

(*x*) *Doe v. Nepean*, 5 B. & Ad. 86; *S. C.* (in error) 2 Mee. & W. 894.

(*y*) *Rex v. Gardner*, 2 Camp. 513; *Rex v. Topham*, 4 T. R. 126; *Brickett v. Hulse*, 7 A. & E. 454. As to the effect of admissions implied upon the pleadings, by omitting to traverse a fact alleged or otherwise, see *Digby v. Thompson*, 4 B. & Ad. 821; *Stracy v. Blake*, 1 Mee. & W. 168; *Bennion v. Davison*, 3 Mee. & W. 179; *Smith v. Martin*, 9 Mee. &

W. 304; *Spencer v. Barough*, *ibid.* 425; *Bingham v. Stanley*, 2 A. & E. N. S. 117; *Gould v. Oliver*, 2 Man. & G. 208.

(*z*) Reg. Gen. H. 4 W. 4, r. 20. See *Lewis v. Howell*, 6 A. & E. 769; *Rutter v. Chapman*, 8 Mee. & W. 388; *Spencer v. Barough*, *ubi sup.*

(*a*) 3 Bl. Com. 367; B. N. P. 298; *Iley v. Moorhouse*, 6 Bing. N. C. 52.

(*b*) 3 Bl. Com. 368; 1 Stark. Ev. 389, edit. 1824.

are to understand that that which is of a secondary, shall not be substituted for that which is of a primary kind, where the primary evidence is accessible,—a rule founded on the presumption that such a substitution is probably prompted by some sinister motive. Thus it is inflexibly held that the contents of no private deed or writing (as distinguished from a record or other public document) can be proved by a copy (still less by mere oral evidence), if the writing be in existence, and can be procured by the party by whom the proof is offered,—but the writing itself must be produced (*c*). And upon the same principle, if there should be occasion to prove its execution by a witness, (a proof that the law in general requires, unless it be 30 years old, and come out of the possession of some person naturally entitled to the custody (*d*),) this can only be done by calling the particular person (if any) whose name is thereon written as attesting the execution (*e*); or by calling one of them at least, if there be several; or by proving that such attesting witnesses are all dead or otherwise incapable of giving their testimony (*f*), and then adducing secondary evidence of the execution, as by proof of the handwriting to one or more of their signatures (*g*). And so strict is this rule in its nature, that even the admission of the party himself, that the instrument was executed by him, (unless

(*c*) *McGahey v. Alston*, 2 Mee. & W. 206; *Jones v. Tarleton*, 9 Mee. & W. 675; *Howard v. Smith*, 3 Man. & Gr. 254.

(*d*) *B. N. P.* 255; 2 Phil. on Ev. 203; *Doe d. Neale v. Samples*, 8 A. & E. 151.

(*e*) *Gillett v. Abbott*, 7 A. & E. 783; *Poole v. Warren*, 8 A. & E. 582; *Collins v. Bayntun*, 1 A. & E. N. S. 117. The declaration of a subscribing witness that he had forged the deed, is not admissible. *Stobart v. Dryden*, 1 M. & W. 615.

(*f*) *Adams v. Kerr*, 1 B. & P.

360; *Crosby v. Percy*, 1 Taunt. 364; *Ward v. Wells*, *ibid.* 461; *Swire v. Bell*, 5 T. R. 371.

(*g*) *Nelson v. Whittall*, 1 B. & Ald. 19; *Doe d. Rowlandson v. Wainwright*, 5 A. & E. 520; *Brown v. Thornton*, 6 A. & E. 185; *R. v. Koops*, *ibid.* 198; *Doe d. Beck v. Heakin*, *ibid.* 495; *Doe d. Bassett v. Mew*, 7 A. & E. 240; *Doe d. Edward v. Gunning*, *ibid.* 243; *McGahey v. Alston*, 2 Mee. & W. 206; *Falmouth (Earl) v. Roberts*, 9 Mee. & W. 469; *Lloyd v. Mostyn*, 10 Mee. & W. 478.

such admission be made for the express purpose of the trial,) will not suffice to excuse the absence of the attesting witness (*h*).

On the other hand, however, it is held that there are no degrees in secondary evidence ; but that where the circumstances are such as to excuse a party from giving the proper or primary proof, he is at liberty to resort to any species of secondary evidence within his power (*i*). Thus where the defendant is let into secondary evidence of the contents of a letter, by showing that the letter itself is in the possession of the plaintiff, who has had notice to produce it in court, but fails to do so, the defendant is then at liberty to give *oral* evidence of its contents, and is not bound to produce a *copy*, though in fact he should have kept one (*h*).

Another principal rule is, that *hearsay* evidence, that is, evidence of what has been said or declared out of court by a person not party to the suit, is not admissible. For our law deems it unsafe to rely upon the assertions of any person, unless he be called as a witness in the cause, and deliver his testimony under the sanction of an oath, and the check which the power of cross-examination imposes (*l*). And this rule is so absolute that the death of the person by whom the statement was made, and the consequent impossibility of producing him as a witness, makes no difference. Upon the same principle no written entry or memorandum made by a person not party to the suit can in general be admitted as evidence even after his death, between the plaintiff and defendant, for this falls under the same consideration, and is in effect not distinguishable from hearsay evidence.

The rejection of hearsay is subject, however, to exception

(*h*) *Abbot v. Plumbe*, 1 Doug. 216 ; *R. v. Harringworth*, 4 M. & S. 354.

(*i*) *Doe d. Gilbert v. Ross*, 7 Mee. & W. 102.

(*k*) *Brown v. Woodman*, 6 Car. & P. 206. Per Parke.

(*l*) *Wright v. Doe d. Tatham*, 7 A. & E. 384 ; *Stobart v. Dryden*, 1 Mee. & W. 615.

in particular cases. For, first, the declaration of a third person is in certain instances admitted as forming part of the *res gestæ*, or as deriving particular credibility from the circumstances under which it was made. Thus, if a question arises, whether a third person committed an act of bankruptcy, by absenting himself from his house, his own declaration made at the time, that he did so to avoid a creditor, is good evidence (*m*). So the books of stewards, or other receivers, though strangers to the suit, are admitted in evidence after their death, so far as the entries therein tend to charge them with the receipt of money; because such acknowledgments having been made against their own interest, are entitled on that ground to peculiar weight (*n*). Again, declarations or statements in the nature of hearsay are admitted, where evidence of that description happens to constitute the natural and appropriate means of proof; as upon questions of pedigree, custom, boundary, and the like (*o*). To which we may add, as another exception from the general rule, that a statement made by a third person will be receivable as evidence against the plaintiff or defendant in the cause, if he be proved to have been present when the statement was made; for then it becomes material to consider, whether by his language or demeanour on the occasion, it appeared to receive his assent (*p*).

These rules relate to the *admissibility* of evidence in different cases. As to its *effect*, we may remark in general, that it may be either *positive* or *circumstantial* (*q*); by the former of which, we commonly understand a proof of the

(*m*) 1 Stark. Ev. 48.

(*n*) Higham v. Ridgway, 10 East, 109; Doe d. Daniel v. Coulthred, 7 A. & E. 235; Wright v. Doe d. Tatham, *ibid.* 335. As to entries against interest, see 2 Smith's Leading Cases, 193; Fursdon v. Clogg, 10 Mee. & W. 574.

(*o*) Davies v. Lowndes, 5 Bing. N. C. 161; Thomas v. Jenkins, 6 A. &

E. 525; Wright v. Doe d. Tatham, *ubi sup.*; Barraclough v. Johnson, 8 A. & E. 99; Brisco v. Lomax, *ibid.*

(*p*) 1 Stark. Ev. 50.

(*q*) 3 Bl. C. 371. Blackstone defines circumstantial evidence as the proof of such circumstances as "either necessarily or usually attend the fact itself," *ibid.*

very fact in question; by the latter, a proof of circumstances from which, according to the ordinary course of human affairs, the existence of that fact may reasonably be *presumed* (s). And the strength of circumstantial or presumptive evidence varies according to the nature and particular combination of the facts proved. It may either be barely sufficient to decide the question, supposing no evidence to be offered to the contrary; or it may be strong enough to prevail against evidence offered on the other side, or even so violent as not to admit of being repelled by any adverse evidence whatever, except under very particular circumstances.

Such are the general principles of law relative to the evidence; all which, it is to be observed, [is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders; and before the judge and jury; each party having liberty to except to its competency; which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed in the face of the country; which must curb any secret

(s) It is to be observed, that the presumptions here referred to are of a different kind from the presumptions of law before mentioned (vide sup. p. 609), which are in truth mere legal maxims in the abstract, on which, as on other points of law, the jury are to follow implicitly the direction of the judge. But the presumptions in the text arise upon special circumstances; and are inferences which in general the jury are at liberty to adopt or reject, though even here their discretion is in some instances controlled by precedent, or the manifest reason of the case. Thus we have legal decisions upon the sufficiency of the presumption of death, under particular circumstances (vide cases cited sup. 610, n.); of loss of ship, *Green v.*

Brown, 2 Str. 1199; of seisin in fee, *Jayne v. Price*, 5 Taunt. 326; *Doe d. Rees v. Williams*, 2 Mee. & W. 749; of death without issue, *Doe d. Oldham v. Wolley*, 8 B. & C. 22; *Earl of Roscommon's case*, 6 Clark & Fin. 97; of a reconveyance, *Fenney v. Jones*, 3 M. & Scott, 472; *Doe d. Oldham v. Williams*, 1 Mee. & W. 749; of unity of possession, *Clayton v. Corby*, 2 Gal. & D. 174; of authority as agent, *Owen v. Barrow*, 1 N. R. 101; *Ward v. Evans*, Salk. 442; of payment, *Welch v. Seaborn*, 1 Stark. Rep. 474; *Oswald v. Legh*, 1 T. R. 270; *R. v. Stephens*, 1 Burr. 434; of payment by cheque, *Egg v. Barnett*, 3 Esp. 196; of due stamping, *Doe d. Fryer v. Coombs*, 3 A. & E. N. S. 687.

[bias or partiality that might arise in his own breast. And if either in his directions or decisions he mis-states the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a *bill of exceptions* (t), stating the point wherein he is supposed to err; and this he is obliged to seal by stat. Westm. 2, 13 Edw. I. c. 31; or if he refuses so to do, the party may have a compulsory writ against him (u), commanding him to seal it, if the fact alleged be truly stated; and if he returns that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal, examinable not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below (v); but a *demurrer to the evidence* (w) shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law, in which case the adverse party may, if he pleases, demur to the whole evidence; which admits the truth of every fact which has been alleged, but denies the sufficiency of them all in point of law, to maintain or overthrow the issue (x), which draws the question of law for the cognizance of the jury to be decided (as it ought) by the court] above, or in banc. [But neither these demurrers to evidence, nor bills of

(t) As to a bill of exceptions, see *Money v. Leach*, 3 Burr. 1692; *Gardner v. Baillie*, 1 Bos. & Pul. 32; *Bell v. Potts*, 5 East, 49; *Dillon v. Doe d. Parker*, 1 Bing. 17; *Culley v. Doe d. Taylerson*, 11 A. & E. 1008; *Davies v. Lowndes*, 1 Man. & Gr. 473; *Galway v. Baker*, 5 Clark & Fin. 157; *Doe d. Tolson v. Fisher*, 2 Bligh, N. S. 9; *Gibbs v. Pike*, 1 Dowl. N. S. 409; *R. v. Rowley*, 2

Dowl. N. S. 335.

(u) Reg. Br. 182; 2 Inst. 487.

(v) *Davenport v. Tyrrell*, 1 W. Bl. 679.

(w) As to demurrer to evidence, see *Fanshaw v. Cocksedge*, 1 Doug. 119; *S. C. in error*, 3 Bro. P. C. 690; *Cort v. Birkbeck*, 1 Doug. 218; *Gibson v. Hunter*, 2 H. Bl. 187; *Miller v. Warre*, 4 B. & C. 538.

(x) Co. Litt. 72; 5 Rep. 104.

[exceptions,] particularly the former, [are at present so much in use as formerly, since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

This open examination of witnesses *vivâ voce*, in the presence of all mankind, is much more conducive to the clearing up of truth (*y*) than the private and secret examination taken down in writing before an officer or his clerk in the ecclesiastical courts, and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning if misunderstood, which he can never do after a written deposition is once taken. Besides, the occasional questions of the judge, the jury and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for, besides the respect and awe with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short, by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike when their depositions are reduced to writing and read to the judge in the absence of those

[who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it. These are a few of the advantages attending this, the English way of giving testimony *ore tenus*: which was also indeed familiar among the *antient* Romans, as may be collected from Quintilian (z), who lays down very good instructions for examining and cross-examining witnesses *vivâ voce*. And this, or somewhat like it, was continued as low as the time of Hadrian (a); but the civil law, as it is now modelled, rejects all public examination of witnesses.]

[When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury,] recapitulating in greater or less detail, as he may deem necessary, the statements of the witnesses and the contents of the documents adduced on either side, commenting upon the manner in which they severally bear upon the issue, and giving his opinion upon any matter of law that may arise upon them, but leaving the jury to determine for themselves the credit and weight to which they are respectively entitled, and to decide whether, upon the whole, the preponderance of proof is in favour of the plaintiff or defendant (b).

(z) Instit. Orat. l. 5, c. 7.

(a) See his Epistle to Varus, the legate or judge of Cilicia: "*Tu magis scire potes, quanta fides sit habenda testibus; qui, et cujus dignitatis, et cujus astimationis sint; et, qui simpliciter visi sint dicere; utrum unum eundemque meditatum sermonem attulerint, an ad ea quæ interrogaveras extempore verisimilia responderint.*"—Ff. 22, 5, 3.

(d) Before the case is left to the jury, and in the progress of the trial, it often happens that an objection is taken either by the plaintiff or defendant, on the ground of some particular discrepancy between the allega-

tions which the adverse party has made in his pleadings, and the evidence offered in support of his allegations. Such discrepancy upon a particular point, as distinguished from a total failure of proof upon the substance of the case, is called a *variance*; and objections founded on variances were formerly allowed to a very inconvenient extent; but by 9 Geo. 4, c. 15, and 3 & 4 Will. 4, c. 42, s. 23, the court is now empowered to allow an amendment of the allegation, if the variance is not material to the merits, and the opposite party has not been prejudiced thereby.

[The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their verdict; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge (c), till they are all unanimously agreed (d).] [If they eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict (e). Also, if they speak with either of the parties or their agents after they have gone from the bar, or if they receive any fresh evidence in private, or if, to prevent disputes, they cast lots for whom they shall find, any of these circumstances will entirely vitiate the

(c) "A method of accelerating unanimity," says Blackstone, "not wholly unknown in other constitutions of Europe, and in matters of greater concern. For by the Golden Bull of the empire, if, after the congress is opened, the electors delay the election of a king of the Romans for thirty days, they shall be fed only with bread and water till the same is accomplished." 3 Bl. Com. 375.

(d) "This necessity of a total unanimity seems to be peculiar to our own constitution (see Barrington on the Stats. 19, 20, 21); or at least in the *nembda*, or jury of the antient Goths, there was required, even in criminal cases, only the consent of the major part; and in case of an equality, the defendant was held to be acquitted. Stiern. l. i. c. 4." 3 Bl. Com. 376. With us the principle as to unanimity results, as a consequence, from the rule of requiring as many as twelve to concur, in connexion with that of admitting only twelve to sit upon the jury. The

former originated in the regard antiently paid to this particular number, vide sup. p. 588, n.; the latter probably from its being deemed unnecessary to swear in more than twelve, when the verdict of twelve would always suffice. It is to be observed, however, that in *grand juries* it is the practice to swear in a large number (usually twenty-three), though less can make a valid presentment. The principle, whatever may be its origin, is attended at least with one practical advantage of the utmost importance, that in the event of a difference of opinion, it secures a discussion, and enables any one dissentient juror to compel the other eleven fully and calmly to reconsider the question. Some remarks will be found on this subject, in the Third Report of the Common Law Commissioners, p. 70, where it is recommended, that if after a deliberation of twelve hours, nine out of the twelve concur, their verdict should be received.

(e) See *Hughes v. Budd*, 8 Dowl. P. C. 315.

[verdict. And it has been held, that if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned (*f*), the judges are not bound to wait for them, but may carry them round the circuit, from town to town, in a cart (*g*).]

[When they are all unanimously agreed, the jury return back to the bar; and before they deliver their verdict the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement, to which by the old law he was liable in case he failed in his suit, as a punishment for his false claim (*h*). To be *amerced* or a *mercie*, is to be at the crown's mercy with regard to the fine to be imposed; *in misericordia domini regis pro falso clamore suo*. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be *nonsuit*; *non sequitur clamorem suum*. Therefore, it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain the issue, to be voluntarily nonsuited (*i*) or withdraw himself, whereupon the crier is ordered to *call the plaintiff*; and if neither he nor anybody for him appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff than a verdict against him; for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had and judgment consequent thereupon, he is for ever barred from attacking the defendant upon the same ground of complaint. But in case the plaintiff appears, the jury, by their foreman, deliver in their verdict (*j*).]

(*f*) Mirror, c. 4, s. 24.

(*g*) Lib. Ass. fol. 40, pl. 11.

(*h*) Finch, L. 189, 252.

(*i*) A plaintiff cannot be nonsuited

but by his own consent. *Dewan v. Purday*, 3 Ad. & El. 166.

(*j*) The jury may be discharged by consent of the parties from finding any

By the verdict (*verè dictum*) [they openly declare (i) themselves to have found the issue, for the plaintiff, or for the defendant : and if for the plaintiff, they also assess the damages sustained by the plaintiff, in consequence of the injury upon which the action is brought (k).]

Sometimes, if there arises in the case any difficult matter of law, the course is adopted of finding a *special* verdict—a course [grounded on the Statute of Westminster, 13 Edw. I. c. 30, s. 2,] and the adoption of which is entirely at the choice of the jury (l). In a verdict of this description [they state the naked facts, as they find them to be proved, concluding conditionally,] that if upon the whole matter the court shall be of opinion that the issue ought to be found for the plaintiff, they then find for the plaintiff, and assess the damages accordingly ; if otherwise, then for

verdict ; or, by the like consent, a juror may be withdrawn, so that no verdict can be given. As to which, see *Harries v. Thomas*, 2 Mee. & W. 38. And if they find a verdict as to all the material issues, they may be discharged by the judge (even without consent of parties), as to any issue that becomes immaterial. *R. v. Johnson*, 5 Ad. & E. 513.

(i) The verdict is said in our books to be either *privy* or *public*—and it is stated by Blackstone, that “ a *privy* “ verdict is when the judge hath left “ or adjourned the court, and the jury “ being agreed, in order to be delivered from their confinement, obtain “ leave to give their verdict *privily* to “ the judge out of court ; ” though he adds, that “ if the judge hath adjourned “ the court to his own lodgings, and “ there receives the verdict, it is a *public* “ *lic* and not a *privy* verdict.” He also states, that a *privy* verdict is of no force, unless afterwards affirmed openly in court, and that the jury may then

vary from it, if they please ; and that it is “ a dangerous practice, allowing “ time for the parties to tamper with “ the jury, and therefore very seldom “ indulged in.” 3 Bl. Com. 377. At the present day it is wholly disused.

(k) By 3 & 4 Will. 4, c. 42, s. 28, the jury may upon the trial of any issue or inquisition of damages, allow interest at the current rate upon debts from the time when they were payable, if payable by virtue of a written instrument and at a time certain ; or if payable otherwise, then from the time when demand of payment shall have been made in writing, with notice that interest will be claimed. And by sect. 29, may give damages in the nature of interest, in actions of trover and trespass *de bonis asportatis*, over and above the value of the goods, and also in actions on policies of assurance, over and above the money insured.

(l) *Mayor of Devizes v. Clark*, 3 A. & E. 506.

the defendant. [This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.]

But either party, if dissatisfied with the decision, is at liberty to appeal to the proper court of error in the Exchequer Chamber (*m*).

[Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless,] as the law of the case is doubtful, [to the opinion of the court above, on a *special case*, stated by the counsel on both sides,] and containing a statement of facts mutually agreed upon, [which has this advantage over a special verdict, that it is attended with much less expense, and obtains a much speedier decision,] no writ of error being, in this course of proceeding, allowable to the unsuccessful party, because nothing is entered on the *record* but the general verdict, and it does not appear on what evidence that verdict was found. This method, indeed, has proved for many reasons so convenient in practice, that to enable the parties to obtain the benefit of an analogous mode of proceeding at an earlier stage of the suit, and avoid the expense and delay of a trial altogether, they are now permitted by 3 & 4 Will. IV. c. 42, s. 25, to frame a special case (if able to agree upon a state of facts) immediately after issue joined, and bring it at once before the court in banc for its decision. But as regards a special case of the kind more immediately in question, viz. that which arises in the course of a trial, it is to be observed, that the resort to it must be by consent of the jury, as well as of the parties, (though in practice the jury never interfere on the subject,) the rule of law being, that the jury are always at liberty, without either special verdict or special case, to find their verdict absolutely, if they think fit, either for plaintiff or defendant (*n*).

(*m*) As to this court, vide sup.
p. 418.

(*n*) 3 Bl. Com. 378, cites Litt.
s. 368.

[When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury—a trial which, besides the other vast advantages which we have occasionally observed in its progress, is also as expeditious and cheap, as it is convenient, equitable, and certain :] and indeed the trial by jury [ever has been looked upon as the glory of the English law.] In estimating its advantages it is to be considered, that [if the administration of justice is entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will frequently have an involuntary bias towards those of their own rank and dignity—for it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*. On the other hand, if the power of judicature were placed at random in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law which are general propositions flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope; the law is well known, and is the same for all ranks and degrees: it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best

[investigators of truth, and the surest guardians of public justice.]

The peculiar importance too of this mode of trial deserves remark, as applied to criminal cases, and most of all to those in which the crown is directly concerned. It may be truly affirmed, that [the most transcendant privilege which any subject can enjoy or wish for is, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals;] and there can be no doubt that this constitution [has secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer (o) who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.]

IV. The issues of law or fact having been decided in the several methods above described, and it thus being ascertained whether the plaintiff is entitled to maintain his action for the civil injury which is the subject of complaint, or the defendant to be discharged from the action, the next step is the *judgment*, that is, the formal award of redress in the one case, or discharge in the other. And as regards the issue in law, we have already been led in part to advert to this proceeding, the judgment in that case being in effect given at the time that the court deliver their opinion or decision upon the legal question, though it is not formally drawn up and entered on record till afterwards.

If the issue be an issue in fact, triable by jury, whatever is done subsequent to the joining of issue and awarding the trial is entered on the back of the *nisi prius* record, and is called the *postea*; [the substance of which is,

(o) Montesq. Sp. L. xi. 6.

[that *postea* (*afterwards*) the said plaintiff and defendant appeared by their attorneys at the place of trial, and a jury being sworn, found such a verdict; or that the plaintiff, after a jury sworn, made default, and did not prosecute his suit, or as the case may happen.]

The unsuccessful party may then at any time, within four days after the return day of the *distringas* or *habeas corpora* (called the day in *banc* (*p*)), move the court in *banc* for a *new trial*, or for *arrest of judgment*, or for *judgment non obstante veredicto*, or for a *repleader* (*q*).

And, 1. As to the motion for a *new trial* (called in some cases a motion for a *venire facias de novo*). The ground of this may be any irregularity in the proceedings connected with the trial, such as want of notice of trial; or any matter *dehors* (that is, extrinsic to) the record, tending to show that though the trial may have been in due form, yet it has not done justice between the parties, such as [any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves; or that it appears by the judge's report certified to the court, that the jury have brought in a verdict without, or contrary to, evidence (*r*), so that he is reasonably dissatisfied therewith; or that they have given exorbitant damages; or that the judge himself has misdirected the jury, so that they found an unjustifiable verdict.] For any of these or any similar reasons it is competent to the unsuccessful party, whether plaintiff or defendant, to move that the verdict that has been given be set aside, and a new trial

(*p*) 1 Arch. by Ch. 375; vide Reg. H. T. 2 Will. 4, 65, 67; Thomas v. Jones, 4 Mee. & W. 28; Chapman v. Eley, 4 Man. & Gr. 631; Perkins v. Vaughan, 1 Dowl. N. S. 700.

(*q*) The defendant may also move to enter a *nonsuit*, or the plaintiff to set aside a *nonsuit* and enter a verdict for plaintiff. But such motions can

only be made by leave of the judge who tried the cause, granted during the course of the trial.

(*r*) It is a general rule, however, that new trials shall not be granted on the ground of the verdict being against evidence, where the damages are less than 20*l*. Branson v. Didsbury, 12 Ad. & El. 631.

had; the effect of which motion, if it is granted, is, that jury process again issues for summoning a new jury, and a trial of the same issue is instituted *de novo*.

[The exertion of these superintendent powers of the courts in setting aside the verdict of a jury, and granting a new trial on account of misbehaviour of the jurors, is of a date extremely antient. There are instances in the Year Books of the reigns of Edward III. (*s*), Henry IV. (*t*), and Henry VII. (*u*), of judgments being stayed even after a trial at bar, and new *venire's* awarded, because the jury had eaten and drunk without consent of the judge, and because the plaintiff had privately given a paper to a jurymen before he was sworn. And upon these the chief justice Glynn, in 1655, grounded the first precedent that is reported in our books (*v*) for granting a new trial upon account of *excessive damages* given by the jury, apprehending with reason that notorious partiality in the jurors was a principal species of misbehaviour.] About that time, however, [it was clearly held for law (*w*), that whatever matter was of force to avoid a verdict ought to be returned upon the *postea*, and not merely surmised by the court, lest posterity should wonder why a new *venire* was awarded without any sufficient reason appearing upon the record. But very early in the reign of Charles the Second new trials were granted upon *affidavits* (*x*), and the former strictness of the courts of law in respect of new trials having driven many parties into courts of equity to be relieved from oppressive verdicts, they are now more liberal in granting them; the maxim at present adopted being this, that in all cases of moment, where justice is not done upon one trial, the injured party is entitled to

(*s*) 24 Edw. 3, 24; Bro. Ab. tit. Verдите, 17.

(*t*) 11 Hen. 4, 18; Bro. Ab. tit. Enquest, 75.

(*u*) 14 Hen. 7, 1; Bro. Ab. tit. Verдите, 18.

(*v*) Style, 466.

(*w*) Graves v. Short, Cro. Eliz. 616; Palm. 325; 1 Brownl. 207.

(*x*) R. v. Lord Fitz-Water, 1 Sid. 235; Goodman v. Cotherington, 2 Lev. 140.

[another (y).] Nor can there be any doubt that this is a reasonable and salutary course of practice. [If every verdict was final in the first instance, it would tend to destroy this valuable method of trial.] [Either party may be surprised by a piece of evidence which, had he known of its production, he could have explained or answered; or may be puzzled by a legal doubt which a little recollection would have solved. In the hurry of a trial, the ablest judge may mistake the law, and misdirect the jury; he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury are to give their opinion *instanter*, that is, before they separate, eat or drink, and under these circumstances the most intelligent and best intentioned men may bring in a verdict which they themselves upon cool deliberation would wish to reverse. Granting a new trial, under proper regulations, cures all these inconveniences, and at the same time preserves entire, and renders perfect, that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject, and nothing is now tried but the real merits of the case. A sufficient ground, however, must be laid before the court to satisfy them that it is necessary to justice that the

[cause should be farther considered. If the matter be such as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by affidavit; if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict; and the court give their reasons at large why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are upon full deliberation clearly explained and settled. Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections which do not go to the real merits. It is not granted in cases of strict right, or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict ought always very strongly to preponderate (2).]

(1) Formerly the principal remedy for reversal of a verdict unduly given was by writ of *attaint*, which was a proceeding for setting aside, by a jury of twenty-four, the verdict of a jury of twelve; the effect of which was, that if the former jurors were found to have given a false verdict they incurred infamy, with imprisonment and forfeiture of their goods; which two latter punishments were in course of time commuted into a pecuniary penalty, (3 Bl. Com. 388, 402). For

it was deemed in the early times when this proceeding was first established, when the constitution of juries was different from what it now is, and they were summoned to *testify on their own knowledge* as to the truth of the facts in dispute, (see Plac. Ab. 3, Norfolk. &c.; 2 Reeves's Hist. 270, &c.) that a false verdict must necessarily be a perjured one. The writ of *attaint* was a form of proceeding at least as old as the reign of Henry II. and remained in force (though quite fallen out of use)

2. [*Arrests of judgment* arise from *intrinsic* causes appearing on the face of the record.] As if in an action for slanderous words, the defendant denies the words, and issue is joined thereon, now if a verdict be found for the plaintiff, that the words were actually spoken respectively, the fact is established, yet the defendant may move in arrest of judgment that the words are not in their nature actionable, and if the court be of that opinion the judgment shall be arrested, and never entered for the plaintiff. [And this is an invariable rule, that whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action.] [But the rule will not hold, *è converso*, that every thing that may be alleged as cause of demurrer will be good in arrest of judgment;] for merely formal objections, which might have been sufficient ground for demurrer, will be cured or *aided* after verdict, by certain statutes called the *Statutes of amendment* and *jeo fails(a)*, by which the strictness of the more antient law on this subject has been very considerably relaxed, and inaccuracies in point of form are no longer allowed [in the last stage of a cause to unravel the whole proceedings.] Many objections will also be aided by the effect of the verdict itself. For it is often a ground of demurrer that the allegation of the plaintiff is too general, and omits to set forth in a distinct and particular manner some fact or facts material to his case; but in such instances it also frequently happens that the verdict itself cures the objection, by ascertaining those facts which before, from the inaccuracy of the plead-

till abolished by the stat. 6 Geo. 4, c. 50, s. 60. A full account of it is given in Blackstone's Commentaries, loco, sup. cit.

(a) So called, because when a pleader in the days of oral pleading perceived any slip in the form of his allegation, he acknowledged such error by the expression *j'ay faillé*, and

obtained liberty to amend. These statutes are as follows:—statute 14 Edw. 3, c. 6; 9 Hen. 5, c. 4; 4 Hen. 6, c. 3; 8 Hen. 6, c. 12, 15; 32 Hen. 8, c. 30; 18 Eliz. c. 14; 21 Jac. 1, c. 13; 16 & 17 Car. 2, c. 8 (styled in 1 Vent. 100, an omnipotent act); 4 Ann. c. 16; 9 Ann. c. 20; 5 Geo. 1, c. 13.

ings, might be dubious, [since the law will not suppose that a jury, under the inspection of a judge, would find a verdict for the plaintiff, unless he had proved those circumstances, without which his general allegation is defective (*b*).]

Thus, if there be occasion to allege in the pleading, a grant or conveyance, to the efficacy of which a deed is essential, a general allegation that such grant or conveyance took place, without showing that it was by deed, would be demurrable: but if upon such a fault in the declaration, the defendant instead of demurring were to plead over, and deny that in point of fact such grant or conveyance was made, and issue being joined upon this, the jury should find the affirmative, the defect would be aided, and would form no ground for arresting the judgment (*c*). Upon this subject, however, it is material to attend to the distinction between a title defectively stated and an omission to state any title; for the latter is a fault which the verdict will never cure (*d*).

3. A motion for *judgment non obstante veredicto* is also made in respect of some intrinsic objection apparent on the face of the record, but differs in this particular, from the motion in arrest of judgment, that it is made on the part of the plaintiff and not of the defendant, and is accordingly grounded on an objection to the pleading of the latter, and not the former party. Thus, where the plea *confesses*, and attempts to *avoid*, the declaration by some matter which amounts to no sufficient avoidance of it in point of law, and the plaintiff, instead of demurring, has taken issue upon the truth of the plea in fact, and that issue has been found in favour of the defendant, yet the plaintiff may move that, without regard to the verdict, the judgment be given in *his* favour. For the plea having

(*b*) *Woolton v. Hele*, 1 Mod. 292; *Bell v. Simpson*, 2 Wils. 10; *Stennel v. Hogg*, 1 Saund. 228, n. (1).
(*c*) Com. Dig. Pleader (C. 87);

Stennel v. Hogg, 1 Saund. 228, n. (1).
(*d*) *Crouther v. Oldfield*, Salk. 365; 3 Bl. Com. 395; *Stennel v. Hogg*, ubi sup.

confessed the matter of fact in the declaration, and having opposed it by an allegation which, though true in fact, is bad in law, it appears upon the whole that the plaintiff is entitled to maintain his action (*d*).

4. The motion for a *repleader* is, where [by the misconduct or inadvertence of the pleaders, the issue is joined on a fact totally immaterial or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given. As if in an action on the case in assumpsit against an executor, he pleads that he himself, instead of the testator, made no such promise (*e*);] or, if in an action of debt on bond conditioned to pay ten pounds ten shillings on a certain day, the defendant pleads payment of ten pounds (*f*),—in such cases the court will, after a verdict, award a repleader, (*quod partes replacitent*); the effect of which is, that [the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c. wherein there appears to have been the first defect or deviation from the regular course.] But repleaders are not now very usual, for they are awarded only where it is apparent to the court that the case of the party in default might probably be made good by a different manner of pleading (*g*). It is besides a rule, that a repleader is never granted in favour of the party who made the first fault (*h*); nor in any case except where complete justice cannot otherwise be attained (*i*).

If judgment on the verdict is not by some of these means

(*d*) As to judgment *non obstante*, &c. see *Gilb. C. P.* 126; *Lambert v. Taylor*, 4 *Barn. & Cres.* 138; *Negelen v. Mitchell*, 7 *Mee. & W.* 612; *Merry v. Chapman*, 10 *A. & E.* 524, n.; *Beaty v. Warren*, 4 *Man. & Gr.* 158; *Atkinson v. Davies*, 2 *Dowl. N. S.* 778; *Shrewsbury v. Blount*, 2 *Man. & Gr.* 508.

(*e*) 2 *Vent.* 196.

(*f*) *Kent v. Hall*, *Hob.* 135. Et

vide *Spong v. Wright*, 9 *Mee. & W.* 629; *Atkinson v. Davies*, *ubi sup.*

(*g*) *R. v. Phillips*, *Burr.* 301, 302; 3 *Bl. Com.* 395.

(*h*) *Bennett v. Holbeck*, 2 *Saund.* 319 c.

(*i*) *Goodburne v. Bowman*, 9 *Bing.* 532. As to cases where a repleader will not be granted, see *Negelen v. Mitchell*, 7 *Mee. & W.* 612; *Gwynne v. Burnell*, 6 *Bing. N. C.* 453.

suspended or averted within the period above stated, and no special case, special verdict, or bill of exceptions, has occurred at the trial, so as to vary the course of the ordinary proceedings, it follows that the party who obtained the verdict is, at any time after the expiration of that period, entitled to judgment.

He accordingly proceeds to *sign judgment*: that is, to obtain the signature of the proper officer of the court to the proceedings, signifying generally that judgment is given in his favour, which (in the case of a judgment upon verdict) stands in the place of any actual delivery of it by the judges themselves. And upon the signing of the judgment, *costs* are also taxed in his favour by the same officer,—a subject on which we shall presently have occasion to speak more at large.

In some cases, indeed, the successful party is enabled to sign judgment at an earlier period than above described. For by a modern provision of the legislature, 1 Will. IV. c. 7, s. 2, introduced to obviate the inconvenience which in many cases arose from obliging a party, in whose favour a verdict had been given, to wait until the next term before he could take out execution, the judge before whom the cause is tried is empowered to certify that execution ought to issue *forthwith*, or on some future day to be specified; in which case judgment may be signed, and costs taxed, and execution issued forthwith, according to the terms of such certificate; with liberty, however, to the opposite party to move the court in *banc*, within the period of four days from the return of the *distringas* or *habeas corpora*, that such judgment and execution shall be set aside, or a new trial had, as the nature of the case may require (*k*).

(*k*) Also, by 3 & 4 Will. 4, c. 42, s. 18, at the return of any writ for trial *before the sheriff*, judgment may be signed, costs taxed, and execution issued *forthwith*, unless the sheriff or

his deputy shall certify that judgment ought to be suspended until defendant shall have been able to apply for a new trial, &c.; or a judge shall order it to be stayed.

After signing judgment, the next step is to *enter the judgment on record*, by transcribing the whole proceedings on a parchment roll, and depositing this roll, and filing it of record, in the treasury of the court; and this, though properly the act of the court, is in practice performed by the successful party, or rather by his attorney (*l*).

Hitherto we have pursued the history of a cause that comes to issue and verdict. But an action may have many other results; on any of which, the plaintiff or defendant (as the case may be) may be entitled to judgment. For in an action judgment will be awarded, [first, where the facts are confessed by the parties, and the law determined by the court, as in the case of judgment upon *demurrer*; secondly, where the law is admitted by the parties, and the facts disputed, as in the case of judgment on a *verdict*; thirdly, where both the fact, and the law arising thereon, are admitted by the defendant, which is the case of judgments by *confession* or *default*; or lastly, where the plaintiff is convinced that either the fact or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments upon a *nonsuit* or *retraxit*,] or *nolle prosequi* (*m*). In all these cases, however, the practical course is so far the same, that the successful party proceeds, upon the matter being determined in his favour, to sign judgment, tax costs, and enter his judgment on record, in manner above described.

[The judgment, though pronounced or awarded by the judges,] or supposed to be so, where no actual delivery of it takes place, is, properly speaking, [not *their* determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly

(*l*) This entry on record is in reality often omitted; the signing judgment and issuing execution being in many cases sufficient for the purposes of the successful party.

(*m*) As to judgment by *nolle prosequi*, see *Bowden v. Horne*, 7 Bing. 716; *Fagan v. Dawson*, 4 Man. & G. 711; 3 & 4 Will. 4, c. 42, s. 32.

[follows from the premises of law and fact, which stand thus: Against him who hath rode over my corn, I may recover damages by law; but A. hath rode over my corn, therefore I shall recover damages against A. If the major proposition be denied, this is a demurrer in law; if the minor, it is then an issue in fact; but if both be confessed (or determined) to be right, the conclusion or judgment of the court cannot but follow; which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it. What that remedy may be is indeed the result of deliberation and study to point out; and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own, but “it is considered,” *consideratum est per curiam*, that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own, but the act of law pronounced and declared by the court after due deliberation and inquiry.

All these species of judgments are either *interlocutory* or *final*. *Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon] demurrer to [pleas in abatement of the suit or action, in which it is considered by the court that the defendant do answer over, *respondet ouster*; that is, put in a more substantial plea. It is easy to observe that the judgment here given is not final, but merely interlocutory; for there are afterwards farther proceedings to be had when the defendant hath put in a better answer.

But the interlocutory judgments most usually spoken of are those incomplete judgments whereby the *right* of the

[plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained ; which is a matter that cannot be done without the intervention of a jury (*n*). This can only happen where the plaintiff recovers ; for where judgment is given for the defendant it is always complete as well as final. And it happens where the defendant suffers judgment to go against him by default, or *nihil dicit*, as if he puts in no plea at all to the plaintiff's declaration ; by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just ; or by *non sum informatus*, where the defendant's attorney declares he has no instructions to say any thing in answer to the plaintiff, or in defence of his client, which is a species,] though latterly fallen into disuse, [of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of debt for a sum certain, the judgment is absolutely complete ; and therefore it is very usual, in order to strengthen a creditor's security, for the debtor to execute a *warrant of attorney* to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned, (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*,) in an action of debt to be brought by the creditor against the debtor for the specific sum due ; though this practice is subject to several restrictive regulations for the prevention of fraud or oppression (*o*). But where damages are to be

(*n*) So by the old Gothic constitution, the cause was not completely finished till the *nembda* or jurors were called in "*ad executionem decretorum judicii, ad estimationem pretii, damni, lucri*," &c.—Stiernhook, *De Jure Goth.* l. 1, c. 4.

(*o*) By 1 & 2 Vict. c. 110, ss. 9, 10, no warrant of attorney or *cognovit* shall be of any force unless there be present some attorney of one of the superior courts on behalf of the person giving it, expressly named by him, and attend-

ing at his request, to inform him of the nature and effect of the instrument before the same is executed ; which attorney shall subscribe his name as a witness to the due execution, and thereby declare himself to be attorney for the party, and state that he subscribes as such attorney. Also, by 3 Geo. 4, c. 39 ; 1 & 2 Vict. c. 110, s. 60, and 6 & 7 Vict. c. 66, warrants of attorney and *cognovits* must be filed in the Court of the Queen's Bench within twenty-one days after execution, or else

[recovered, a jury must be called in to assess them;] and therefore, in such a case, [the entry of the judgment is, “that the plaintiff *ought* to recover his damages (indefinitively); but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men, he inquire into the said damages, and return such inquisition into court.” This process is called a *writ of inquiry* (*p*);] in the execution of which the sheriff (*q*),] by his under-sheriff, [sits as judge, and tries by a jury, subject to nearly the same law and conditions as apply to the trial by jury at *nisi prius*, what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea*; and thereupon it is considered that the plaintiff *do* recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff, upon an action wherein damages are recovered, the judgment is also incomplete without the aid of a writ of inquiry (*r*).

judgment must be signed, or execution issued thereon, to render the same valid as against the *assignees* of the party, if he should become bankrupt or insolvent. See also 6 Geo. 4, c. 16, s. 108; 1 & 2 Vict. c. 110, s. 61, as to the effect allowed to judgments on warrants of attorney, and in cases of bankruptcy and insolvency.

(*p*) Vide sup. p. 25. By 1 Will. 4, c. 7, a writ of inquiry may be returnable whether in term time or vacation; and four days after the return thereof (see Reg. Gen. Hil. 2 Will. 4, pl. 67) costs may be taxed, final judgment signed, and execution issued forthwith, unless the sheriff certify that judgment ought not to be signed until defendant shall have

had an opportunity to apply to the court to set aside the execution of the writ, or unless a judge shall think fit to stay the judgment.

(*q*) There is one case in which a writ of inquiry may be executed not before the sheriff, but the judge at *nisi prius*, viz. in an action on a bond conditioned for performance of any acts other than the payment of money. Vide stat. 8 & 9 Will. 3, c. 11; sup. vol. ii. pp. 159, 160.

(*r*) In some cases, where the amount of damages is a mere matter of calculation, the court itself, through the medium of its officers, will assess the damages, instead of putting the plaintiff to the necessity of suing out a writ of inquiry; as where it becomes ne-

[*Final* judgments are such as at once put an end to the action,] by an award of redress to one party, or discharge of the other, as the case may be.

If the judgment be for the plaintiff, the form is that he do recover, *quod recuperet*, the debt or damages, and that the defendant be amerced for his wilful delay of justice : or if for the defendant, that the plaintiff take nothing by his writ, *nil capiat per breve*, and also be amerced for his false claim, *pro falso clamore suo(s)* ; and that the defendant may go thereof without a day, *eat inde sine die*, i. e. without any farther continuance or adjournment.

At common law, all judgments had relation to the first day of the term in which they were signed, though in point of fact not signed till afterwards (*t*), the term being considered, for this and some other purposes, as consisting but of one day. But by a modern rule, Reg. Gen. H. T. 4 Will. IV. reg. 3, all judgments, whether interlocutory or final, shall be entered of record, of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day, provided however that it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc* (*u*).

It is a property of judgments in the superior courts (resulting from the effect of the law of execution, of which we shall presently speak more at large), that they bind all *lands, tenements, and hereditaments*, of which the defendant himself, or any person in trust for him, shall be seised or

necessary to assess the amount due to plaintiff on a bill of exchange or promissory note, or for rent, arrears of annuity, mortgage money, or the like. 2 Arch. Pr. by Chitty, p. 599.

(*s*) It was also formerly adjudged in certain cases, that the defendant be taken up, *capitur*, till he pay a fine to the crown for his falsehood, or the like. This is now, by 5 W. & M. c. 12, abolished in some actions, and in all disused.

(*t*) *Jefferson v. Morton*, 2 Saund. by Wms. 8 k.

(*u*) We may remark here, that even prior to this rule of court it had been provided, by 29 Car. 2, c. 3, ss. 13, 14, 15, in favour of purchasers *bond fide* for valuable consideration, that as *against such purchasers*, judgments shall, in consideration of law, bind the lands of the debtor only from such time as they shall be signed, and shall not relate to the first day of terms.

possessed, at the time when the judgment is recorded, so as to take effect in priority to all subsequent incumbrances (*x*), subject however to a proviso, that as regards all purchasers, mortgagees and creditors, the judgment shall have no such effect until it be duly registered in the Common Pleas, which registration must also be renewed every five years (*y*). But as to *goods and chattels*, the effect of a judgment, it is to be observed, is different, for these were bound at common law, not from the judgment, but from the date (or *teste*) of the writ of execution thereon, and are now, by the Statute of Frauds, 29 Car. II. c. 3, s. 16, bound only as from the time of the delivery of that writ to the sheriff to be executed (*z*). By statute also 1 & 2 Vict. c. 110, s. 13, such judgments operate as a *charge in equity* upon all lands, tenements and hereditaments (including those of copyhold or customary tenure), wherein the debtor has any estate or interest whatever, whether in law or equity, or over which he has any disposing power, exerciseable without the assent of any other person for his own benefit, but subject to the same proviso as before mentioned, requiring registration, to make the charge effectual as against purchasers, mortgagees and creditors (*a*).

Moreover, by 1 & 2 Vict. c. 110, s. 17, it is provided, that every judgment debt shall carry interest, at the rate of 4*l.* per cent. per annum, from the time of entering up

(1) 13 Edw. 1, c. 18; 29 Car. 2, c. 3, s. 10; 2 Inst. 395; Co. Litt. 265 b; Palmer v. Humphrey, Cro. Eliz. 584; Underhill v. Devereux, 2 Saund. by Wms. 68 f.

(y) 1 & 2 Vict. c. 110, ss. 13, 19; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82. To affect lands in the counties of Middlesex and York, the judgment must also be entered in the proper offices of those counties respectively. 5 Ann. c. 18; 6 Ann. c. 35, 7 Ann. c. 20; 8 Geo. 2, c. 6.

(z) Burton, Comp. 302. As to the priority as between the judgment or execution creditor and the assignees of the debtor, in the several cases of bankruptcy and insolvency, see Newland v. —, 1 P. Wms. 92; Orlebar v. Fletcher, ibid. 737; 3 Geo. 4, c. 39; 6 Geo. 4, c. 16, s. 108; 1 & 2 Vict. c. 110, s. 61; 2 & 3 Vict. c. 29.

(a) As to the effect on purchasers and mortgagees without notice of judgment, see also 2 & 3 Vict. c. 11, s. 5.

the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*b*).

[Thus much for judgments—to which *costs* are a necessary appendage—it being now as well the maxim of ours, as of the civil law, that “*victus victori in expensis condemnandus est*” (*c*), though the common law did not allow any.] They are accordingly taxed (as already remarked) at the same time that the judgment is signed, and always form part of its aggregate amount (*d*). But the law of costs deserves a more particular attention than could conveniently have been bestowed upon it when the subject was before touched upon, and we therefore resume the consideration of them in this place.

[The first statute which gave costs *eo nomine*] to the plaintiff [was the Statute of Gloucester, 6 Edw. I. c. 1, as did the Statute of Marlbridge, 52 Hen. III. c. 6, to the defendant, in one particular case relative to wardship in chivalry, though in reality costs were always considered and included in the *quantum* of damages, in such actions where damages are given; and even now costs for the plaintiff are always entered on the roll as increase of da-

(*b*) The statement in the text refers, it will be observed, only to *judgments* in the proper and technical sense of that term, viz. the award of redress in an action at law, consequent upon the decision of the issue, or the default of the party in prosecuting his claim or defence. But it may be remarked here, that by a recent provision of the legislature, *rules* of the courts of common law, *decrees* and *orders* in equity, *orders* of the lord chancellor in lunacy and bankruptcy, and *orders* of the court of review in matters of bankruptcy, are now placed upon the same footing with judgments; it being enacted by 1 & 2 Vict. c. 110, s. 18, that all these, when made for the pay-

ment of money, shall have the effect of judgments in the superior courts of common law, and that the same remedies shall be allowed upon them.

(*c*) Cod. 3, 1, 13.

(*d*) There are many cases of vexatious proceeding, in which the legislature has formerly provided, that the party in fault shall be punished by the payment to his adversary of *double*, or (sometimes) *treble* costs; but it is by 5 & 6 Vict. c. 97, all such provisions are now repealed; and it is enacted, that the adversary shall be entitled only to a full and reasonable indemnity, to be taxed by the proper officer, which taxation shall, as in ordinary cases, be subject to review.

[mages, by the court. But because those damages were frequently inadequate to the plaintiff's expenses, the Statute of Gloucester orders costs to be also added, and farther directs, that the same rule shall hold place in all cases where the party is to recover damages.] But with the exception that has been mentioned, [no costs were allowed the *defendant* in any shape, till the statutes 23 Hen. VIII. c. 15; 4 Jac. I. c. 3; 8 & 9 Will. III. c. 11; and 4 Ann. c. 16, which very equitably gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had recovered.] And even after these enactments, there still remained several cases in which the law was defective in this particular, both as regards the plaintiff and the defendant; but these defects have now been remedied by the statutes 9 Ann. c. 20; 1 Will. IV. c. 21; 3 & 4 Will. IV. c. 42, ss. 31—34; and 4 & 5 Will. IV. c. 39 (e).

[The king,] or queen regnant, [and any person suing to his or her use, shall neither pay nor receive costs (f); for that besides that the sovereign is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them. And it seems reasonable to suppose that the queen consort participates of the same privilege (g).] Paupers also, [that is, such as will swear themselves not worth 5*l.*] in the world, except their wearing apparel, and the matter in question in the cause, are, by statute 11 Hen. VII. c. 12, and 23 Hen. VIII. c. 15, exempt, when plaintiffs (but not when defendants), from the payment of court fees, and entitled to have counsel and attorney as-

(e) By 3 & 4 Will. 4, c. 42, s. 31, which for the first time provides, that *executors* and *administrators*, when *plaintiffs*, shall be liable to costs, power is given to the court or a judge to exempt them from such liability by special order, in any particular case. See as to *taxing costs*, 7 Will. 4 & 1

Vict. c. 30, s. 23.

(f) 24 Hen. 8, c. 8.

(g) At common law, as before explained, parties against whom judgment was given were liable to be *amerced*. But the queen consort was excepted from *amercement*. Co. Litt. 133.

signed to them by the court without fee, and are excused from paying costs when unsuccessful, [but shall suffer other punishment at the discretion of the judges (*h*).] A person however thus suing *in forma pauperis* [may recover costs, though he pays none, for the counsel and clerks are bound to give their labour to *him*, but not to his antagonists.] To prevent also trifling and malicious actions, certain statutes, viz. 43 Eliz. c. 6, s. 2, and 3 & 4 Vict. c. 24 (*i*), have been passed, by the combined effect of which, if the plaintiff in any personal action, other than trespass or trespass on the case, and not being for any title or interest in lands, or concerning the freehold or inheritance of lands, shall recover at the trial, debt or damages to an amount of less than 40s., and the judge so certifies, no more costs shall be awarded than the amount of the debt or damages so recovered; and in trespass, or trespass on the case, if the plaintiff obtains a verdict for less than 40s., he shall recover no costs whatever, unless the judge shall certify that the action was really brought to try some right, besides the right to recover damages for the trespass or grievance alleged, or that such trespass or grievance was wilful and malicious; provided, however, that this shall not extend to actions for trespasses over lands, houses, or the like, in respect of which any notice not to trespass thereon shall have been served on the defendant. And as regards one particular kind of action on the case, viz., that for slanderous words, it is farther provided by 21 Jac. I. c. 16, that if the jury find a verdict for

(*h*) Blackstone says, it was formerly usual to give such paupers, if nonsuited, their election, *either to be whipped or pay their costs*. 3 Bl. Com. 400. As to suing *in forma pauperis*, see *Gougenheim v. Lane*, 1 Mee. & W. 136; *Foss v. Racine*, 4 Mee. & W. 610; *Lovewell v. Curtis*, 5 Mee. & W. 158; *Brunt v. Wardle*, 3 Man. & Gr. 534.

(*i*) The last of these acts repeals 43 Eliz. c. 6, so far as it relates to costs in actions of trespass or trespass on the case, and so much of 22 & 23 Car. 2, c. 9, as relates to costs in personal actions; and see as to 3 & 4 Vict. c. 24, *Shuttleworth v. Cocker*, 1 Man. & Gr. 829; *Marriott v. Shanley*, *ibid.* 853.

less than 40s., the plaintiff shall have no more costs than damages (*k*). Moreover, if the plaintiff instead of taking out execution upon a judgment bring an action thereon, he shall, by 43 Geo. III. c. 46, s. 4, recover no costs of suit, except the court or a judge shall otherwise order; nor are any costs allowed in a penal action to a plaintiff suing as a common informer, unless they are expressly given by the statute on which he sues; for as the action itself creates the right, he has no claim to damages, and by the general rule of law, where there are no damages, there can be no costs (*l*).

After judgment, execution will immediately follow, unless the party condemned institutes some proceeding to be relieved from its effect. The principal method for this purpose (*m*) is by—

V. *Writ of error*, to the next superior court of appeal. [A writ of error lies for some supposed mistake in the

(*k*) As to costs in actions for small amount it may farther be remarked, that if an action be brought in the superior court for a demand which might have been sued for in the county court or a court of requests, the superior court will stay the proceedings on payment of the debt only, or will, after verdict, deprive the plaintiff, on a proper application for that purpose, of his costs. See *Tarran v. Morgan*, 2 C. M. & R. 252. Also by Reg. Gen. Hil. Vac. 4 Will. 4, it is ordered, that in actions of assumpsit, debt, or covenant, where the sum recovered, &c. shall not exceed 20*l*. without costs, the plaintiff's costs shall be taxed, according to a reduced scale, unless the judge certify that the cause was proper to be tried before him, and not before the sheriff or the judge of an inferior court.

(*l*) *College of Physicians v. Har-*
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rison, 9 B. & C. 524.

(*m*) Besides the writ of error, Blackstone speaks of a writ of attain, a writ of deceit, and a writ of *audita querela*. But the two first of these are now abolished, and the last may be said to be nearly obsolete. The writ of attain we have before had occasion to notice, vide sup. p. 627. The writ of deceit was an action brought in the Common Pleas to reverse a judgment obtained in any real action, by fraud or collusion between the parties, to the prejudice of the right of a third person. It is abolished by 3 & 4 Will. 4, c. 27, s. 36. The *audita querela* is a writ that lies for the defendant against whom judgment is given, and who is therefore in danger of execution, or perhaps actually in execution, but who is entitled to be relieved upon some matter of discharge which has happened since

[proceedings of a court of record ; for to amend errors in a base court, not of record, a writ of *false judgment* lies (*n*).] The writ of error lies either upon matter of *fact* or matter of *law*. The errors in *fact* which may give rise to a proceeding of this kind are not numerous, but among them are the following:—that the defendant, being an infant, appeared by attorney, and not by guardian (*o*) ; or that the plaintiff or defendant was a married woman when the suit commenced (*p*), or died before the judgment was obtained (*q*). And it is to be observed, that in such cases the writ is called a writ of error *coram vobis*, and is addressed to the court itself in which the judgment was given ; for the matter of fact not being apparent on the face of the proceedings, there has been in reality no error, so far as the judges are concerned, and the correction of the record is therefore left, without impropriety, to *them*. But the most usual species of the writ of error is that which is founded upon some supposed mistake of *law*, apparent on the face of the record, such as might have formed a sufficient ground at the proper time, for a motion in arrest of judgment, or a motion for a judgment *non obstante veredicto* (*r*), and the writ of error, in such case, is addressed not to the court in which the judgment was given, but to a superior tribunal.

[Formerly the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as mis-spellings, and other mistakes of the clerks,] which in

the judgment, as if the plaintiff has given him a general release, or if he has paid the debt to the plaintiff. It is a writ directed to the court in which the judgment is recovered, stating that the complaint of the defendant has been heard, *audita querela defendantis*, and then setting forth the matter of complaint, and enjoining the court to call the parties before them, and cause justice to be done. But the indulgence now shown by the courts in granting relief upon *motion*, has almost rendered an

audita querela useless, and driven it nearly out of practice. Vide 2 Saund. 137 e ; Giles v. Nathan, 5 Taunt. 558.

(*n*) As to false judgment, vide Overton v. Swettenham, 3 Bing. N. C. 786 ; Crookes v. Longden, 5 Bing. N. C. 410.

(*o*) Bird v. Pegg, 5 B. & Ald. 418.

(*p*) King v. Jones, Ld. Raym. 1525.

(*q*) Jacques v. Cesar, 2 Saund. 101.

(*r*) Vide sup. p. 629.

general were held sufficient, unless amended, to vitiate the proceedings, even after judgment; and were at the same time incapable of amendment after judgment was actually recorded, unless within the very term in which the act so recorded was done; for during the term the record was [held to be in the breast of the court, but afterwards it admitted of no alteration (*s*).] But such defects as these are now, for the most part, provided for by the statutes of amendment and jeofails before-mentioned (*t*), by the effect of which they have in some instances ceased to be accounted errors after verdict or judgment by default, and in others at those periods of the cause are amendable as a matter of course, and without payment of costs to the opposite party. And even in cases of more material mistake, amendments have latterly been often allowed, upon the condition of paying costs, though the application for leave to amend should not have been made till after the judgment has been recorded, and the term passed, or even a writ of error brought (*u*).

As to the course of proceeding incidental to a writ of error, in the ordinary case of an alleged error in *law*, the immediate appeal from the Queen's Bench, Common Pleas, or Exchequer, is to the Court of Exchequer Chamber (*v*). When any such error therefore is supposed to exist in a judgment of any of the three former courts, a writ of error must be sued out of the common law side of the Court of Chancery, addressed to the chief justice of the court below in which the judgment was given, and commanding him

(*s*) Blackstone attributes this strictness partly to a "narrowness of thinking," on the part of the judges, partly to a "real shallowness, but affected timidity," engendered by some severity shown in the reigns of Edw. I. and Edw. III., with regard to the offence of surreptitiously erasing and altering records, particularly the infliction of rigorous forfeitures and

punishments on the several judges, for alleged malpractices in this particular. 3 Bl. Com. 408, 411.

(*t*) Vide sup. p. 628.

(*u*) Richardson v. Mellish, 3 Bing. 334; S. C. in error, 7 B. & C. 819; S. C. Dom. Proc. 1 Clark & Fin. 224; Paddon v. Bartlett, 3 A. & E. 887.

(*v*) Vide sup. p. 418.

to send a transcript of the record to the Exchequer Chamber to be there examined. But it is provided by 10 & 11 Will. III. c. 14, that no judgment shall be reversed by any writ of error not brought within twenty years after such judgment signed or recorded, and prosecuted with effect; provided the party against whom the judgment was given be not an infant, feme covert, *non compos mentis*, or in prison or beyond sea, in which cases the writ must be brought within twenty years after such disability ceases. Also, by Reg. Gen. H. 4 Will. IV. pl. 9, that no writ of error shall stay the execution until a statement be delivered of some particular ground intended to be argued, and if the error so stated shall appear to be frivolous, the court, or a single judge, may order execution to issue. And by 3 Jac. I. c. 8; 16 & 17 Car. II. c. 8, and 6 Geo. IV. c. 96, execution shall not be stayed by any writ of error, unless a recognizance of bail, with two sufficient sureties, be first given to prosecute the writ with effect, and to satisfy the debt and costs if the judgment be affirmed; or unless the court or a judge think fit to dispense with such recognizance (*x*). The writ being issued (*y*), the plaintiff in error procures a transcript of the record to be made out and delivered into the Exchequer Chamber; after which he delivers an *assignment of errors* to the attorney of the opposite party or defendant in error, who is then required to plead to the same. The plea he commonly adopts is that which is called a *joinder in error*, and which signifies that he considers his judgment to be free from objection. There is thus an issue in law between the parties, which is set down for argument, and

(*x*) A writ of error from an inferior court of record, or court of a county palatine, into the Queen's Bench, also issues from the common law side of the Court of Chancery, and is addressed to the judge of the court below. And the execution upon a judgment of a palatine court shall not be stayed without putting in bail (6 Geo. 4, c. 96);

nor the execution upon a judgment of an inferior court of record for damages under 20*l*. (19 Geo. 3, c. 70, s. 5; 7 & 8 Geo. 4, c. 71, s. 6.)

(*y*) It is also to be *allowed* by the proper officer of the court in which the judgment is given. But this is a mere formal proceeding, and takes place as of course.

decided by the Court of Error in the Exchequer Chamber (z). If that Court affirms the judgment, the successful party is entitled to the costs incurred by the writ of error (a), but if the judgment be reversed no such costs are allowed. If necessary, however, a writ of restitution will be awarded to the plaintiff in error, to enable him to recover whatever has been taken from him under the former judgment; or the court will grant that relief in a more summary way, and by its mere rule or order. Upon such affirmance or reversal, either party is at liberty to enter the proceedings in error on the judgment roll below (b), and those proceedings are thus brought to a termination. But the unsuccessful party may still, if he thinks proper, resort to an ulterior appeal, by writ of error, to the House of Lords; the course of proceeding upon which is, in a general point of view, the same as upon writ of error in the Exchequer Chamber (c). But by the practice of that House, each party, before the hearing, prepares and delivers for distribution among the Lords a printed statement of his case, signed by one or more of the counsel who attended the hearing below, or who are to attend the hearing in the House of Lords.

VI. If the regular judgment of the court, after the decision of the suit, be not suspended or reversed by one or other of the methods mentioned in this chapter, the next and last step is the *execution* of that judgment, or putting the sentence of the law in force. This is performed in different manners, according to the nature of the action

(z) The course of proceeding in error is now regulated by Reg. Gen. 4, H., 4 Will. 4. As to the practice on argument in error, see also 9 A. & E. 433, n.

(a) 3 Hen. 7, c. 10; 13 Car. 2, st. 2, c. 2, s. 10; 8 & 9 Will. 3, c. 11, s. 2.

(b) Reg. Gen. H. 4 Will. 4, pl. 16.

(c) By order of 3rd April, 1835. When the House orders the payment of *costs* in error, they are to be taxed by the clerk of the parliament or clerk assistant, in such manner as is directed by 7 & 8 Geo. 4, c. 64, as to the taxation of costs on private bills.

upon which it is founded, and of the judgment which is had or recovered. In the ordinary actions, to which our attention is at present immediately directed, the judgment is for recovery of *money*, (either by way of debt or damages,) and not for recovery of any specific chattel; there being, however, an exception to this in the case of *detinue*, in which the judgment is for recovery of the goods themselves which are detained, or the value thereof, with damages and costs. And in that action there is accordingly a special writ of execution, called [a *distringas*, to compel the defendant to deliver the goods by repeated distresses of his chattels (*d*), or else a *scire facias* against any third person in whose hands they may happen to be, to show cause why they should not be delivered; and if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest, to ascertain the value of the goods and the plaintiff's damages, which (being either so assessed, or by the verdict in case of an issue (*e*),) shall be levied on the person or goods of the defendant. So that after all, if the wrongdoer be very perverse,] he cannot (even in this action) be compelled to a restitution of the identical thing taken or detained; but he still has this election, to deliver the goods or their value (*f*),—an imperfection in our common law for which it is not easy to render a sufficient excuse (*g*).

Where money only is recovered, the practice of the courts allows the judgment creditor to resort to one of the four following writs of execution :

1. The writ of *capias ad satisfaciendum*, which addition distinguishes it from the writ of *capias ad respondendum* before mentioned (*h*), used for arresting a defendant under

(*d*) 1 Rol. Ab. 737; Rast. Ent. 215.

(*e*) Bro. Ab. tit. Damages, 29.

(*f*) Keilw. 64.

(*g*) That assigned by Blackstone,

vol. iii. p. 413, that it is the nature of personal property to be easily concealed or conveyed away, is obviously inadequate.

(*h*) Vide sup. p. 571.

special circumstances at the commencement of the suit. [The intent of the *capias ad satisfaciendum* is to imprison the body of the debtor till satisfaction be made for the debt or damages, and costs. It therefore doth not lie against any privileged persons, peers or members of parliament. And Sir E. Coke also gives us a singular instance (i), where a defendant, in 14 Edw. III., was discharged from a *capias* because he was of so advanced an age, *quod pœnam imprisonmenti subire non potest*. If an action be brought against a husband and wife, for the debt of the wife when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both the husband and wife in execution (k); but if the action was originally brought against herself when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband (l). Yet if judgment be recovered against a husband and wife for the contract, nay, even for the personal misbehaviour (m) of the wife during her coverture, the *capias* shall issue against the husband only.]

[The writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty till he makes the satisfaction awarded; and therefore, when a man is once taken in execution under this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I. c. 24, if the defendant dies while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant, and have him at Westminster immediately after the execution thereof, to make the plaintiff satisfaction for his demand (n). And if he does not then make satisfaction,

(i) Co. Litt. 289.

(k) *Bardolph v. Perry*, Moor, 704.(l) *Doyley v. White*, Cro. Jac. 323.

(m) Cro. Car. 513.

(n) The form is newly modelled pursuant to statute 1 & 2 Vict. c. 110, by Reg. Gen. H. 3 Vict.

[he must remain in custody till he does,] or till otherwise lawfully discharged as an insolvent (*o*).

[If a *capias ad satisfaciendum* (*p*) is sued out, and a *non est inventus* is returned thereon, the plaintiff may sue out a process against the bail, if any were given (*q*), who, we may remember, stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs, or that he would surrender himself a prisoner, or that they would pay it for him. As therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place (*r*). In order to which, a writ of *scire facias* may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his debt and damages. And on such writ, if they show no sufficient cause,] and the defendant does not surrender himself (*s*) within the period prescribed by the practice of the courts (*t*) in this particular, [the plaintiff may have judgment] and execution [against the bail.] It is also in the election of the plaintiff to proceed by *action of debt* against the bail on their recognizance.

(*o*) As to the law of insolvency, see vol. ii. p. 213, and p. 426 of this volume. Et vide as to *insane* prisoners, 1 & 2 Vict. c. 110, ss. 102, 103. Before these statutes, the principal provisions for the benefit of insolvents were contained in the Lords' Act, 32 Geo. 3, c. 28, amended by 26 Geo. 3, c. 44; 33 Geo. 3, c. 5; 37 Geo. 3, c. 85; 39 Geo. 3, c. 50; 49 Geo. 3, c. 6.

(*p*) Prior to the recent act of 7 & 8 Vict. c. 96, a *capias ad satisfaciendum* might issue of any amount whatever. But by that act the remedy by *capias* is now materially restricted; it being provided that no person shall be charged or taken in execution in any court, superior or inferior, for a debt not exceeding 20*l.*, exclusive of the

costs recovered by the judgment.—Prior to this enactment, it had been already provided by 48 Geo. 3, c. 123, that a debtor in execution for a debt not exceeding 20*l.* might, after a year's imprisonment, upon application to the court in which the judgment was recovered, obtain the immediate discharge of his person. *Doe d. Threlfall v. Ward*, 2 Mee. & W. 65; *Gilbert v. Pape*, *ibid.* 311; *Clay v. Bowler*, 5 A. & E. 400.

(*q*) Vide *sup.* p. 570.

(*r*) *Lutw.* 1269—1273.

(*s*) *Lush's Prac.* 663.

(*t*) See 1 Arch. by Chitty, 489, 504; Reg. Gen. H. 2 Will. 4, pl. 81; Reg. Gen. T. 3 Will. 4, pl. 3; *Sanderson v. Brown*, 7 A. & E. 261.

[The next species of execution is against the goods and chattels of the] party against whom the judgment is recovered, [and is called a writ of *fieri facias*, from the words in it, where the sheriff is commanded *quod fieri facias de bonis*, that he cause to be made of the goods and chattels of the party the sum or debt recovered (*u*). This lies as well against privileged persons, peers, &c., as other common persons; and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors (*x*) to execute either this or the former writ: but must enter peaceably; and may then break open any inner door in order to take the goods (*y*). And he may sell the goods and chattels, even an estate for years (which is a chattel real (*z*))] of the party against whom the writ is issued, [till he has raised enough to satisfy the judgment (*a*).] This, however, is subject to such restrictions as the law has deemed it reasonable to impose for the protection of landlords. For by 8 Anne, c. 14, the sheriff cannot lawfully sell off goods lying upon any premises demised to a tenant, unless the landlord be first paid his rent, to the extent of one year's arrears, and by 56 Geo. 3, c. 50, no sheriff shall carry off, or sell for the purpose of being carried off, any straw, hay, manure or the like from any lands let to farm, in any case where by the covenants or agreements in the lease the carrying off of the same is prohibited between landlord and tenant; which latter enactment, however, is accompanied with a proviso that such produce may be lawfully sold to any person who will agree, in writing, to use and expend the same upon the lands, according to the obligation of the tenant. At common law, moreover, no chattel could be taken under

(*u*) The form is newly modelled pursuant to statute 1 & 2 Vict. c. 110, by Reg. Gen. H. 3 Vict.

(*x*) 5 Rep. 92.

(*y*) Palm. 54; Pugh v. Griffith, 7 A. & E. 827.

(*z*) 8 Rep. 171; vide sup. vol. i.

p. 262.

(*a*) Where the execution is at the suit of the plaintiff, the plaintiff may by 43 Geo. 3, c. 46, s. 5, levy also the poundage fees, and other expenses of the execution. As to fees, vide 7 Will. 4 & 1 Vict. c. 55.

a *fi. fa.* that was not in its nature properly capable both of manual seizure and sale. But now by 1 & 2 Vict. c. 110, s. 12, it is enacted that the sheriff may upon a *fieri facias* (whether sued out of a superior or inferior court) take any money, bank notes, bills of exchange, or other securities for money, belonging to the party against whom the writ is sued out, and may sue upon such bills or securities in his own name, paying over the money to be recovered thereon, to the creditor. It is to be observed, that [if part only of the debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue (*b*).] And farther, that if the sheriff is unable to sell the goods at a reasonable price, he may make his return upon the writ, that they remain in his hands for want of buyers, upon which the party suing out the execution may proceed to take out a writ of *venditioni exponas*, and under this latter writ the sheriff is bound to sell them for the best price, however inadequate, that can be obtained.

[3. A third species of execution is by writ of *levari facias*, which affects a man's goods and the profits of his lands, by commanding the sheriff to levy] the judgment debt on the lands and goods of the party against whom it is issued, [whereby the sheriff may seize all his goods and receive the rents and profits of his lands, till satisfaction be made (*c*). Little use is now made of this writ, the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution, proper only against ecclesiastics, which is given when the sheriff, upon a common writ of execution sued, returns that the party is a beneficed clerk, not having any lay fee. In this case,] inasmuch as the *bona ecclesiastica* are not to be touched by lay hands, a writ goes to the bishop of the diocese, in the nature of a *levari*, or *fieri facias* (*d*), commanding him

(*b*) 1 Rol. Ab. 904; *Dennis v.*
Wells, Cro. Eliz. 344.

(*c*) Finch, L. 471.

(*d*) Reg. Orig. 300; *Judic.* 22; 2
Inst. 4.

to enter into the benefice, and take and sequester the same into his possession, and hold the same until he shall have levied the amount of the judgment out of the rents, tithes, and profits thereof (e), [and thereupon the bishop sends out a *sequestration* of the profits of the clerk's benefice, directed to the churchwardens, to collect the same,] and after providing thereout for the officers of the church, to pay over the surplus to the judgment creditor, until the full sum due to him be raised (f).

[4. The fourth species of execution is by the writ of *elegit*, which is a judicial writ given by the Statute Westminster 2, 13 Edw. I. c. 18.] Before that statute, [a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last-mentioned writs of *fieri facias* or *levari facias*, but not the possession of the lands themselves, which was a natural consequence of the feudal principles which prohibited the alienation, and of course the incumbering of the fief with the debts of the owner (g). And when the restriction of alienation began to wear away, the consequence still continued, and no creditor could take the possession of lands, but only levy the growing profits, so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute, therefore, granted this writ, (called an *elegit*, because it is in

(e) *Harding v. Hall*, 10 Mee. & W. 53. Or the writ may command the bishop to make of the ecclesiastical goods of the party within his diocese the amount for which the judgment is recovered. The latter form of writ is called a *fi. fa. de bonis ecclesiasticis*; the form in the text, a *levari* or *sequestrari facias*. 2 Arch. by Ch. 788.

(f) 2 Burn, E. L. 329; *Pack v. Tarpley*, 9 A. & E. 468; *Harding v. Hall*, *ubi sup.* As to the appointment of a curate to the benefice, pending its sequestration, *vide* 1 & 2 Vict. c. 106, s. 99. As to sequestration by

the assignees of an insolvent debtor, being a beneficed clergyman or curate, 1 & 2 Vict. c. 110, s. 55.

(g) But in case of a debt to the king, it appears by *Magna Charta*, c. 8, that it was allowed by the common law for him to take possession of the lands till the debt was paid. For he being the grand, superior, and ultimate proprietor of all landed estates, might seize the lands into his own hands if any thing was owing from the vassal, and could not be said to be defrauded of his services when the ouster of the vassal proceeded from his own command. 3 Bl. Com. 419.

[the choice or election of the judgment creditor, whether he will sue out this writ or one of the former), by which the judgment debtor's goods and chattels are not sold, but only appraised: and all of them (except oxen and beasts of the plough) are delivered to the judgment creditor at such reasonable appraisement and price in satisfaction of his debt.] Supposing the goods to be not sufficient (*h*), then according to the law as it stood from the time of the passing of the statute of Westminster until the commencement of the present reign, [the *moiety* or one half of the *freehold* lands which he had at the time of the judgment given (*i*), whether held in his own name or by any other, in trust for him (*k*),] were also to be delivered to the judgment creditor, to hold till out of the rents and profits thereof the debt were levied, or till the judgment debtor's interest were expired. But now by 1 & 2 Vict. c. 110, it is provided that upon an *elegit* the sheriff shall deliver execution of *all* lands, tenements, and hereditaments (including those of *copyhold* or *customary* tenure), which the judgment debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any *disposing power* which he might, without the assent of any other person, exercise for his own benefit (*l*). This execution or seizing of lands by *elegit* is of so high a nature that after it the body of the defendant cannot be taken; but if execution can only be had of the goods because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit*, for such *elegit* is in this case no more than a *fieri facias* (*m*). So that body and goods may be taken in execution, or

(*h*) 2 Inst. 395.

(*i*) Ibid.

(*k*) 29 Car. 2, c. 3.

(*l*) The form of the writ is newly

modelled, pursuant to this statute, by
Reg. Gen. H. 3 Vict.

(*m*) Hob. 58.

[land and goods, but not body and land too, upon any judgment between subject and subject,] in which the crown is not concerned (*n*).

Besides these writs of execution, the judgment creditor is enabled, by the 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, to resort to another mode of proceeding to enforce payment out of a species of property which none of these writs can in their nature conveniently reach. For, on the application of any creditor, who has entered up judgment in one of the superior courts at Westminster, a judge of any such court may order that the property of the debtor in government stock, or in the stock of any public company in England, corporate or otherwise, whether standing in his own name or the name of any person in trust for him, shall stand charged with the payment of the amount for which judgment shall have been recovered, with interest; provided, however, that no proceedings shall be taken in order to have the benefit of such charge, till after six calendar months from the date of the order; and farther, that if the judgment creditor, after obtaining such charge, or any other charge or security, under the powers of that act, shall afterwards and before the realization of the property, take the person of the debtor in execution upon the same judgment, he shall be deemed to have relinquished his charge or security.

[These are the methods which the law of England has pointed out for the execution of judgments] in their ordinary course, [and where the demand of the judgment

(*n*) By Reg. Gen. Hil. 2 Will. 4, pl. 75, it shall not be necessary that any writ of execution should be *signed*, but no such writ shall be *sealed* till the judgment paper, *postea*, or inquisition, has been seen by the proper officer. By the 3 & 4 Will. 4, c. 67, s. 2, all writs of execution may be *tested* on the day on which they are issued, and be made *returnable* immediately after the execution thereof.

By 2 Will. 4, c. 39, s. 15, it shall be lawful in term time for the court out of which any writ of *ca. sa.*, *fi. fa.*, or *elegit* shall have issued, to make rules, and also for any judge of any of the courts in vacation to make orders for the *return* of any such writ, and every such order shall be of the same force and effect as a rule of court made for the like purpose.

[creditor is satisfied either by the voluntary payment of the debtor, or by this compulsory process or otherwise, *satisfaction* ought to be *entered on record*, that the debtor may not be liable to be hereafter harassed a second time on the same account.]

And here our summary of the proceedings in a suit at law is brought to its proper close. But before we conclude the chapter, it is right to take some notice of a supplementary remedy, partly in the nature of an action, partly of an execution (*o*), which often follows upon a suit as being the only method of enforcing, under particular circumstances, the judgment therein obtained.

This is the writ of *scire facias*, to which we have had occasion in former places to make some incidental reference. It is used in a variety of cases in the law, and in some of them as an independent and original proceeding (*p*); but we speak of it at present as supplemental only to an action, an application of it to which resort is had when the circumstances are such that the law no longer allows the judgment to be enforced by so summary a method as an ordinary writ of execution, but deems it reasonable to afford to the party charged the opportunity of making a defence. These circumstances are of a kind connected either with lapse of time or change of parties (*q*).

1. As to lapse of time. By the common law [all these writs of execution must be sued out within a year and a day after the judgment is entered, otherwise the court concludes *primâ facie* that the judgment is satisfied and extinct.] But by stat. of Westm. 2, 13 Edw. I. c. 45, a *scire facias* may issue [for the debtor to show cause why the judgment should not be revived and execution had against him; to which the debtor may plead such matter

(*o*) Bac. Ab. Scire Facias (A).

(*p*) Among these is the case of proceeding against *bail*, referred to sup. p. 647.

(*q*) Vide *Underhill v. Devereux*, 2

Saund. by Wms. 72 b, g; *Bosanquet v. Ransford*, 11 A. & E. 520; *Cross v. Law*, 6 Mee. & W. 217; *Whittenbury v. Law*, 6 Bing. N. C. 345.

[as he has to allege, in order to show why process of execution should not be issued ; or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law (r).]

2. As to change of parties. This may occur, 1. In the case of *death* ; and here the rule is, that if the plaintiff or defendant die after final judgment, a *scire facias* must be sued out by or against the representatives of the party deceased, as the case may be, in order to enforce the judgment. But if the death of either occur prior to final judgment, the action would at common law abate ; and the consequence was in many instances the same, where one of two or more joint plaintiffs or defendants died before that period (s). It is now provided, however, by 17 Car. II. c. 8, that the death of neither party, between verdict and judgment, shall have that effect, so as the judgment be entered within two terms after the verdict ; and the course in such cases is, for the survivor to proceed by *scire facias* against the representatives of the deceased (t). And by 8 & 9 Will. III. c. 11, where a sole plaintiff or defendant dies after interlocutory and before final judgment, and the action is such as survives to the personal representative (u), the plaintiff, his executors or administrators, may proceed by *scire facias* against the defendant, his executors or administrators ; and in case of the death of one of several plaintiffs or defendants at any stage of a suit of that description, the action may even without a *scire facias* continue to be prosecuted by the surviving plaintiff or plaintiffs, against the surviving defendant or defendants ; no more being required on that event than to enter a suggestion of such death upon the record. 2. In the case of *marriage*. If a feme sole obtain judgment, or judgment be obtained against her, and she

(r) Co. Litt. 290 b ; 2 Inst. 469.

(t) Earl v. Brown, 1 Wils. 302.

(s) Underhill v. Devereux, 2

(u) Vide sup. p. 466.

Saund. by Wms. 72 g, h.

marry before execution, a *scire facias* must in either case be brought by or against the husband and wife (as the case may be), in order to enforce the judgment (*v*). And so—3. In the case of *bankruptcy* or *insolvency*. If a plaintiff becomes bankrupt or insolvent after he has obtained judgment and prior to execution, the proceeding to enforce the judgment must be by *scire facias*, in the name of his assignees (*x*).

As to the course of proceeding, incident to a *scire facias*, it is as follows :

The writ is sued out of the court in which the judgment is recorded, and it is made *returnable* in the same court on some day in term. It is then left with the sheriff, in order that the defendant may be summoned upon it, and if he fails to appear in due time after the summons served, or after due endeavour to effect a service, the plaintiff in *scire facias* will be entitled to sign judgment by default, and take out execution. If, on the other hand, the defendant in *scire facias* appears, the plaintiff delivers a declaration, to which the defendant is to plead, and the subsequent course of proceedings to issue, trial, judgment, writ of error and execution, is substantially the same as in that of an ordinary action (*y*). But it is a settled rule, that the defendant in *scire facias* shall never be allowed to plead any matter which he had the opportunity of pleading in the original action (*z*). For the object of the proceeding is not to afford him the means of bringing the original judgment into question, but of showing, if he can, that some matter has occurred since that judgment was given, which entitles him to resist the execution.

(*v*) *Underhill v. Devereux*, 2 Saund. by Wms. 72 k.

(*x*) *Winter v. Kretchman*, 2 T. R. 45.

(*y*) This extends to costs also, which are given as in an ordinary action. See 8 & 9 Will. 3, c. 11, s. 3; Reg.

Gen. H. 2 Will. 4, r. 78; 3 & 4 Will. 4, c. 42, s. 34.

(*z*) *Underhill v. Devereux*, 2 Saund. by Wms. 72 l; *Baylis v. Hayward*, 4 A. & E. 256. See *Fowler v. Rickerby*, 2 Man. & Gr. 760.

CHAPTER XI.

OF THE PROCEEDINGS IN SOME PARTICULAR
ACTIONS.

HAVING now taken a compendious though comprehensive view of the course of proceeding, in actions in general, it becomes necessary to advert to some varieties upon that course, exhibited in the case of particular actions; as to which however it is to be understood that their deviation from the regular system is confined in general to the instances we are about to specify, and that in other respects they are conducted in conformity to that system. The particular actions in question are those of *dower*, *quare impedit*, *replevin*, and *ejectment*.

I. We will begin then with the action of *dower*, intending by this, the principal species of dower *unde nihil habet*; for as regards the writ of right of dower, it is so entirely out of use as to supersede the necessity of giving any account of its practice, and it is enough to say of it that supposing such an action to be brought, it would, as a real action, vary in certain respects from the ordinary course of proceeding in an action personal, as delineated in the last chapter, and be more nearly analogous to that which we are now about to describe (*a*).

With respect to *dower unde nihil habet* (*b*) its proceedings are as follows (*c*).

(*a*) Some farther account of the writ of right in dower will be found in Roscoe on Real Actions, p. 29.

(*b*) Vide *supra*, p. 494.

(*c*) A full description of these will be found in *Williams v. Gwyn*, 2 Saund. by Wms. 43—45 a.

It commences not by summons, but by original writ, this being the method invariably pursued in that antient class of real actions (including actions mixed) of which it is one of the few remaining species. Of the nature of an original writ some account has already been given (*d*); and it has been shown that it is sued out of the Court of Chancery, under the great seal, directed to the sheriff of the county, and made returnable into the court in which the action is intended to be brought. To this we may now add, that both the original writ itself, and all subsequent process founded upon it, must have fifteen days between the *teste* and return (*e*). In dower (according to the practice that has immemorially prevailed in real actions) it must be made returnable in the Common Pleas and in no other court. After it has been sued out and delivered to the sheriff he directs his bailiff to summon the defendant (or *tenant*, as he is called in a real action); which is accordingly done by sticking up and leaving on the premises out of which the dower is claimed, the form of a written summons. But to secure notice to the tenant it is enacted by 31 Eliz. c. 3, s. 2, that after every summons in any real action, fourteen days at least before the return of the original writ, proclamation of the summons shall be made on a Sunday immediately after divine service and sermon, if any sermon there be, but if none, then forthwith after divine service at or near to the most usual door of the parish church or chapel of the parish or town where the lands lie. And now by 7 Will. IV. & 1 Vict. c. 45, such proclamation (like all others theretofore made in churches) shall be reduced to writing or print, and, instead

(*d*) Vide sup. p. 565.

(*e*) It was also formerly necessary that an original writ and all subsequent process thereon should be made returnable on a *general* return-day, there being several days in the term so denominated by way of distinction from the rest. But now by 1 Will. 4, c. 3,

s. 2, all writs that had been usually returnable on general return-days may be made returnable on the third day exclusive before the commencement of each term, or on any day (not being Sunday) between that day and the third day exclusive before the last day of the term.

of being proclaimed in church, shall be affixed, immediately before divine service, on or near the church doors.

On the return of the original writ into the Court of Common Pleas, the tenant is entitled to *cast an essoign*, that is, allege an excuse (whether in fact there be any ground for it or not) for his failing to appear (*f*), which leads necessarily to an adjournment of the cause for a certain period. If after this the tenant fails to appear on the day given by the adjournment, or if he has failed to appear at the return of the writ, and cast no essoign, the plaintiff or (as she is called in dower) demandant is to sue out a farther writ of process, called a *grand cape* (*g*), which commands the sheriff to take the third part of the lands in which dower is claimed, into the king's (or queen's) hands, and summon the tenant to answer on such a day, for his default. If on the return of the *grand cape* there is no appearance, the demandant is entitled to judgment; but if, on the other hand, the tenant appears, the demandant waives the default and accepts the appearance. In this case, or supposing the tenant to appear on the return of the original, and to cast no essoign, or to have appeared after casting an essoign, on the day of adjournment given, the demandant is then to *count* (which is equivalent to *declaring* in an action personal or mixed (*h*),) and by her count is to make demand in general terms of the third part of the lands of her deceased husband.

The tenant is then, as in other actions, to plead or demur, and his plea may be either dilatory or in bar; and his plea in bar must either traverse, or confess and avoid.

(*f*) As to essoins, see *Twining v. Lowndes*, 10 Bing. 65.

(*g*) In case of default *after* appearance a writ of *petit cape* issues, instead of a *grand cape*, but the difference is otherwise little more than nominal. *Roscoe*, 282.

(*h*) It is to be observed, as to the declaration and subsequent pleadings in dower and *quare impedit*, that the

Regulæ Generales of M. T. 3 Will. 4, and H. 4 Will. 4, as to the manner of *intituling*, do not apply, and that they are to be consequently *intituled* according to the form universally in use before those rules were made, viz. thus—"In the Queen's Bench" [or "Common Pleas," or "Exchequer"],
Term, in the year of
Queen Victoria."

Among the pleas in bar peculiar to this action, is that of *ne unques seisie que dower*, viz. that the demandant's husband was never seised of such an estate in the lands in question, as could give the demandant a legal claim to dower; another is *ne unques accouple en loial matrimonie*, viz. that the demandant and her supposed husband were never joined in lawful matrimony; another, that the husband is still living; and another, that the demandant eloped from her husband and lived in adultery with another person (*i*). The replication and subsequent pleadings follow in the same manner as in a personal action. To the plea of *ne unques accouple*, the demandant may reply that she was married at such a place, in such a diocese; on which will follow a trial by certificate (*k*); the court sending to the bishop of the diocese to certify whether there was a marriage or not. To the plea that her husband is still living, she may reply his death; and the issue thereon shall be tried by witnesses (*l*); but all other issues are triable by jury (*m*), and the practice as to jury process and subsequent proceedings is in general the same as in personal actions (*n*).

At the common law there were no *damages* or *costs* in dower; but by the statute of Merton, 20 Hen. III. c. 1, it is enacted, that if a widow shall recover her dower of the lands whereof her husband died seised, the tenant shall yield damages, that is to say, the value of the dower from the time of the death of her husband until the day she shall have judgment to recover seisin; and by the statute of Gloucester, 6 Edw. I. c. 1, which gives costs in all cases where the party is entitled to damages, and by the subsequent statutes of 4 Jac. I. c. 3, and 8 & 9 Will. III. c. 11, costs are now recoverable by the successful party (whether demandant or tenant) in this action. If the jury find a

(*i*) *Hetherington v. Graham*, 6 Bing. 135.

(*k*) As to trial by certificate, vide sup. p. 584.

(*l*) As to the trial by witnesses, vide sup. p. 587.

(*m*) *Roscoe*, 222, 300.

(*n*) By 24 Geo. 2, c. 48, s. 4, it shall not be requisite in the jury process to have above fifteen days between the teste and return.

verdict for the demandant, they ought also to find, 1, that her husband died seised, and also of what estate, and the time of his death ; 2, the annual value of the land ; 3, the amount of damages she has sustained by the detention of her dower. And the judgment in this action, when given for the demandant, is that she recover seisin of a third part of the tenements in demand, to be set forth by metes and bounds, together with the damages and costs (o).

II. *Quare impedit* (p) is also a real action, and consequently commences, like the last, by original writ. The original writ of *quare impedit* directs the sheriff to command the defendants who disturb the presentation (that is, in general, the bishop, patron and clerk), to permit the plaintiff to present a fit person (without specifying whom) to such a vacant church which he claims to be in his gift, and his presentation to which the defendants unjustly hinder, and unless they so do, then that they appear in court on such a day, to show why they hinder him (q).

(o) *William v. Gwyn*, 2 Saund. by Wms. 44 c.

(p) See the account given of the action, sup. p. 516.

(q) “Immediately on the suing out of the *quare impedit*,” says Blackstone, “if the plaintiff suspects that the bishop will admit the defendant or any other clerk pending the suit, he may have a prohibitory writ, called a *ne admittas*,” and “if the bishop doth, after the receipt of this writ, admit any person, even though the patron’s right may have been found in a *jure patronatus*, then the plaintiff, after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by *scire facias*, and shall have a special action against the bishop, called a *quare incumbavit*, to recover the presentation, and also satisfaction in damages for the injury done him

“by incumbering the church with a clerk, pending the suit, and after the *ne admittas* received.” 3 Bl. Com. 248. The *quare incumbavit*, however, being a real action, is now abolished by 3 & 4 Will. 4, c. 27; and it would seem that there is no necessity for a *ne admittas*, where all proper parties have been made defendants in the *quare impedit*; for if the bishop be a defendant, no lapse can occur *pendente brevi*, Wats. C. L. 112; and if the clerk, then, though he was admitted prior or pending the *quare impedit*, he is removed by the mere effect of the judgment in that action. Ibid. 289, 290. And as to any person who has been admitted, and is no party to the *quare impedit*, he may be removed (unless his title be good) by a writ of *scire facias*, founded on the judgment in *quare impedit*. Ibid. 299.

The subsequent course, though partly agreeing, is yet in some respects different from that in dower; for first, the summons on the original is to be served on the defendants, either personally or by fixing it to the church door of the benefice to which the suit relates (*p*); secondly, no proclamation is required under the act of Elizabeth; and lastly, if the defendant do not either appear or cast an *essoign* at the return of the original writ, or if after casting an *essoign* he do not appear at the *ajournment* day, there issues, instead of a *grand cape*, a writ of *attachment*, commanding the sheriff to put the defendants by gages and safe pledges to answer for their default; and if no appearance be entered in due time to this, then a writ of *grand distress* (*q*), commanding the sheriff to distrain the defendants by all their lands and chattels in his bailiwick, in order to compel their appearance. By common law this was a distress infinite, that is, *distringas* after *distringas* was sued out, and issues levied on each, until the defendants appeared (*r*); but by the statute of Marlbridge, 52 Hen. III. c. 12, if the defendants do not appear at the return of the first *distringas*, the plaintiff shall have judgment by default (*s*).

Supposing, on the other hand, the defendants to appear to the process, the plaintiff is then to declare (*t*); and in his declaration must show a title in himself or his ancestors, or those under whom he claims, an actual presentation under that title, and a disturbance before the action brought (*u*). [Upon this, the bishop and the clerk usually disclaim all title, save only the one as ordinary to admit and institute, and the other as presentee of the patron, who is left to defend his own right.] Indeed it

(*p*) Roscoe, 148; Arch. Pl. 436; *Searl v. Long*, 2 Mod. 264; *sed vide* the authorities cited *Tyrrell v. Jenner*, 6 Bing. 285, that personal service is not regular.

(*q*) See *Tyrrell v. Jenner*, *ubi sup.*

(*r*) 2 Inst. 124; Arch. Pl. 437.

(*s*) It is said, however, that before

execution can be awarded, the plaintiff must make title, as to which *vide* Arch. Pl. 437.

(*t*) As to the time for declaration, see *Barnes v. Jackson*, 1 Bing. N. C. 545.

(*u*) *Brickhead v. Archbishop of York*, Hob. 250.

was a rule at the common law, that neither the ordinary nor clerk were at liberty to plead to the right of patronage, as neither of them had any thing therein; but by 25 Edw. III. st. 3, c. 7, the ordinary may now do so, provided he have himself collated by lapse, and the clerk, if he have been collated or presented and instituted (*x*); that is, they may respectively defend their own right so to collate or be instituted. They may each also plead certain dilatory pleas (*y*); or if they mean to deny that they have obstructed the presentation, they may each plead in bar the general issue *ne disturba pas* (*z*); and as this does not deny the right of the plaintiff, it entitles him, so far as these defendants are concerned, to immediate judgment to recover his presentation: though he has also the option of maintaining, if he thinks fit, that a disturbance has in fact been committed, which, if proved, will give him a right to recover damages. The bishop may also plead in bar, that the clerk presented by the plaintiff was unfit, for want of learning or otherwise, to be instituted (*a*). The patron, also, is entitled to resort to certain dilatory pleas (*b*), or may plead *plenarty*, viz. that the church has been full for six calendar months before the issue of the original writ, by virtue of his own presentation (*c*); or may plead, like the ordinary and clerk, and with the same effect, the general issue of *ne disturba pas* (*d*); or may traverse the title alleged by the plaintiff in his declaration. Here, however, this

(*x*) 7 Rep. 26 a; *Elvis v. Archbishop of York*, Hob. 392; *Queen and Middleton's case*, 1 Leon. 45; *Apperley v. Bishop of Hereford*, 9 Bing. 681; *Roscoe*, 231, 239, 241.

(*y*) Com. Dig. Abatement.

(*z*) *Colt v. Bishop of Coventry*, Hob. 193; *R. v. Bishop of Worcester*, Vaughan, 58.

(*a*) Vide sup. p. 79.

(*b*) Com. Dig. Abatement, H. 19, H. 23.

(*c*) Stat. Westm. 2, c. 5, vide sup.

p. 515. A question is made in *Roscoe*, p. 234, as to the effect that the statute of 7 Anne, c. 18, has had as to a plea of plenarty. It is laid down that the clerk also may plead plenarty, but then he must show that the presentation was a lawful title; *Lister v. Cra-meel*, Noy, 30; *S. C.* 1 Brownl. 162; *Roscoe*, 240.

(*d*) *Colt v. Bishop of Coventry*, ubi sup.; *R. v. Bishop of Worcester*, ubi sup.

difference is to be observed, that though as a mere answer to the action, such traverse is a sufficient plea, yet it may be often necessary to go farther, for in a *quare impedit* both parties are in a manner plaintiffs, and either of them entitled to a judgment that he recover the presentation, and have a writ to the bishop for the admission of his clerk; if, therefore, the patron wishes to obtain a judgment of this description, and not merely a judgment discharging him from the action, (which will naturally be the case unless he has presented, and his clerk has been actually admitted,) he must, in addition to the traverse, set forth some matter showing title in himself (*e*).

The trial in *quare impedit* is in several instances by certificate (*f*), but in general by jury. And upon the failure of the plaintiff at the trial in making out his title, the defendant is put upon the proof of *his*, if title has been asserted by his plea. If the right be found for the plaintiff, three farther points are also to be inquired into,—1. Whether the church be full or not; and if it be, upon whose presentation it is full;—2. The yearly value of the church;—3. Whether six calendar months have passed since the avoidance;—all which matters are material to be ascertained, in order to determine the nature of the damages to which the plaintiff be entitled (*g*). For at common law no damages were recoverable in a *quare impedit* (*h*),

(*e*) Vaughan, 7, 8.

(*f*) Vide sup. p. 585; Roscoe, 305; where it is said that not only the issue on the *ability of the plaintiff's clerk*, if the clerk be alive, must be tried by certificate, but also the issue upon *institution, deprivation, or resignation and plenarty*.

(*g*) 2 Inst. 362; 6 Rep. 49 a; Poyner v. Chorleton, Dy. 134 b; 3 Bl. Com. 249.

(*h*) 6 Rep. 51 a. An additional reason is given in the books (see Wats. C. L. 291), as far as regards the first

point, viz. that unless this is ascertained, it will not appear whether the plaintiff is entitled to recover his presentation; because the church may be full upon the presentation of some stranger, not party to the *quare impedit*, and whose title may be better than the plaintiff's. According to Blackstone, the reason for inquiry into the third point (which he describes as whether six calendar months have passed *between the avoidance and the time of bringing the action*) is, that if that period of time has passed, the case

but by the statute of Westm. 2, 13 Edw. I. c. 5, if more than six calendar months have passed by reason of the disturbance of any person, so that the bishop has presented by lapse, and the true patron has lost his presentation, damages shall be adjudged against the disturber to the amount of the value of the church for two years; or if the six calendar months have not passed, then damages to the value of the moiety of the church for one year (i).

The judgment for the plaintiff in a *quare impedit* is, that he recover his presentation, and have a writ to the bishop, commanding him to admit his clerk (k), and also that he recover his damages and costs; and the judgment for the defendant, where he has made out his own title to present, is, with the exception of the damages, the *same* (l). No costs, indeed, were recoverable by either party, in *quare impedit*, until a very recent period (m). But by 4 & 5 Will. IV. c. 39, it is now enacted, that where a verdict is given for the plaintiff, he shall have his costs in addition to his damages; and where a verdict is given against him, or he shall discontinue, or be nonsuited, he shall pay costs to the adverse party; but subject to a proviso, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the

"would not be within the statute,—
"which permits an usurpation to be
"divested by a *quare impedit* brought
"*infra tempus semestris*." But it is
obvious that this cannot be the reason;
for the usurpation is divested by a
plenarty for six months, not by
avoidance for six months. Et vide
what is said by Lord Coke on this
matter, in 6 Rep. ubi sup.

(i) 2 Inst. 362; Boswell's case, ubi sup.; Henslow v. Bishop of Sarum, Dy. 76 b.

(k) F. N. B. 38.

(l) Wats. C. L. 295. If the bishop, upon receiving the writ *ad admittendum clericum*, says Blackstone, does

not admit the plaintiff's clerk, the latter may sue him in a *quare non admisit*, and recover satisfaction in damages. 3 Bl. Com. 250. And this writ would seem still to lie; for as the judgment in it is only to recover damages (F. N. B. 47), it is conceived not to be a real action. Perhaps, however, such a writ is rarely or never necessary; for it is said that a bishop refusing to execute the writ *ad admittendum clericum*, or making an insufficient return to it, may be *fined*. Wats. C. L. 302.

(m) Edwards v. Bishop of Exeter, 6 Bing. N. C. 146.

judge who shall try the cause (or, where there is no trial by jury, the court at large) shall certify that he had probable cause for defending the action; it being however declared, that in no case where the defence shall be grounded on a presentation or collation previously made, shall such presentation or collation be deemed as a probable cause of defence within the meaning of the proviso.

III. In replevin, also, the course of proceeding was formerly (as we have seen (*n*)) by original writ, though of a description different from that in dower and *quare impedit*; as it directed the sheriff not to summon the defendant into any of the superior courts at Westminster, but to replevy the goods, and determine the matter in his own county court. We have seen, too, that this method has become obsolete; and that the course now is, to begin by levying a plaint in the county court, without suing out any original writ; and it has been shown (*o*) by what method of practice the goods are replevied, and the suit removed, by writ of *recordari*, from the county court to one of the courts of Westminster Hall. Upon the delivery of this writ to the sheriff at any time before judgment given, his cognizance of the cause is at an end; and, in obedience to the writ of *recordari*, he must summon the defendant to appear in the superior court on the day when it is returnable (*p*). Before the end of the second term, after this return day, the writ, with its return, must be filed in the superior court; and if the defendant does not appear, the plaintiff obtains a rule calling upon him to do so; which expires in four days; and if he fails to comply, there is a process by *pone per vadios*, and after that by *distringas*, or, if necessary, by repeated writs of *distringas*; upon which issues may be levied from time to time until the appearance is effected (*q*).

(*n*) See the account given of Replevin, *sup.* p. 520.

(*o*) Vide *sup.* p. 523.

(*p*) *Davies v. James*, 1 T. R. 373.

(*q*) *Roscoe*, 629; *Lush*, Pr. 851.

Upon appearance, the next step is for the plaintiff to declare; and if he omits to do so in due time (r), the defendant may sign judgment of *non pros.* (s). The declaration (which states in general terms the taking of the goods in a certain place) being delivered, the subsequent course of pleading differs from that in other personal actions, chiefly in the following particular: that the defendant's plea may not only tend to his acquittal or discharge from the action, but may claim a *return* of the goods, admitting that they were taken, but insisting that they were lawfully taken, as a distress. Such a plea is called an *avowry*, or (if the distress was made, not in his own right, but as a servant for another) a *cognizance*; and the plaintiff's next pleading is called a *plea in bar*; which the defendant answers by a *replication*; and so to the end of the series; the names of all the pleadings subsequent to the avowry or cognizance being thus transposed and thrown into a reversed order from that in which they stand in ordinary cases. Also, by the statute 4 Ann. c. 16, relative to double pleading, the defendant is entitled to several avowries, as well as the plaintiff to several pleas in bar; and where the distress was for rent, the statute 11 Geo. II. c. 19, gives the defendant the power of resorting to a *general* form of avowry or cognizance, a provision introduced to protect landlords from the inconvenience of specially setting forth their title. Instead of an avowry or cognizance, however, the defendant may plead in abatement or bar, which will be followed by a replication on the part of the plaintiff, according to the ordinary course of pleading. Thus, the defendant may plead in bar *non cepit*; viz. that he did not take the goods, which is considered as the general issue in replevin.

The issue may be made up either by plaintiff or defend-

(r) The defendant may obtain a rule for the plaintiff to declare, which expires in four days.

(s) Before judgment of *non pros.*

can be signed for want of a declaration, it seems there must also be a demand of declaration. Lush, Pr. 852.

ant (*t*); for as the defendant, in case of a judgment in his favour, may obtain a return of the goods, both parties are considered as in a manner plaintiffs,—a circumstance in which this action is analogous to that of *quare impedit*. As to the judgment, it awards, when given in favour of the plaintiff, damages for the unlawful taking and detaining; when given for the defendant, either a return of the goods, or, if the distress was for rent, then, at the option of the defendant, a recovery of the amount of rent in arrear. For by statute 17 Car. II. c. 7, if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record, in nature of an avowry or cognizance; or if judgment be given against him on demurrer, then without any such suggestion, the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or if more, then so much as shall be equal to such arrear, with costs. Or if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impanelled to try the cause shall assess such arrears for the defendant; and if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a farther distress or distresses.

Where the defendant has judgment for a return of the goods, there issues in his favour [a writ *de retorno habendo*, whereby the goods are returned again into his custody, to be sold or otherwise disposed of, as if no replevin had been made.] And when this judgment is by the default or nonsuit of the plaintiff, [the plaintiff might, at the common law, have brought another replevin, and so *in infinitum*, to the intolerable vexation of the defendant; whereupon the Statute of Westminster 2, c. 2, restrains the plaintiff, when nonsuited, from suing out any fresh replevin, but allows him a *judicial* writ issuing out of the original record, and called a writ of *second deliverance*, in order to have the same distress again delivered to him on

[giving the like security as before. And if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first replevin, he shall have a writ of *return irreplevisable*; after which no writ of second deliverance shall be allowed (u).] On the other hand, [if pending a replevin for a former distress, a man distrains again for the same rent or service, then the party distrained upon is not driven to his action of replevin, but shall have a writ of *recaption* (x), and recover damages for the defendant, the re-distrainor's, contempt of the process of the law.] In replevin, as in other actions personal, costs are recoverable (y); and by statute 11 Geo. II. c. 19, if the replevin be founded on a distress for rent, quit rents, relief, heriot, or other service, and the plaintiff shall become nonsuit, discontinue, or have judgment against him, the defendant shall recover *double* costs of suit. But by a recent provision of 5 & 6 Vict. c. 96, s. 2, double costs in this case (as in all others where they are given by any public act of parliament) are now reduced to "such full and reasonable indemnity as to all expenses incurred, as shall be taxed by the proper officer in that behalf.

IV. We now arrive at *ejectment*, the fourth and last, but by far the most important of the anomalous actions of which we proposed in this chapter to treat, being indeed (with the exception of dower) the only action in which land is now capable of being specifically recovered. Some explanation has been already given (z) of the manner of its introduction into our judicial system, and the contrivance upon which it is built; but it is to the practical course of an ejectment that our attention is now required; and the better to apprehend this, it will be useful first to advert to the antient and original form of this

(u) 2 Inst. 340.

(x) F. N. B. 71.

(y) Statute of Gloucester, 6 Edw.

1, c. 1, s. 2; 7 Hen. 8, c. 4; 21

Hen. 8, c. 19, s. 3; 17 Car. 2, c. 7, s. 2.

(z) Vide sup. p. 490.

proceeding, and afterwards to examine that which it wears in the modern practice.

According to the antient form, then, the claimant or person intending to recover by ejectment the possession of land wrongfully withheld from him, [made (as by law he might) (a) a formal entry on the premises, and being so in possession of the soil, he there, upon the land, sealed and delivered a lease for years to some third person or lessee; and having thus given him entry, left him in possession of the premises. This lessee was to stay upon the land until the prior tenant, or he who had the previous possession, entered thereon afresh and ousted him, or until some person (either by accident or by agreement beforehand) came upon the land and turned him out or ejected him. For this injury the lessee was entitled to his action of ejectment against the tenant, or this *casual ejector*, whichever it was that ousted him, to recover back his term and damages;] and an action was accordingly brought; but if brought against the casual ejector, such action would of course remain undefended, and the lessee would be allowed to recover judgment as by default; the effect of which would have been, that unless the tenant had had some opportunity of intervention, the lessor or real claimant would, in the name of this lessee, have been enabled to gain possession of the premises, without any trial of the right between the real parties. But to prevent this, it became [a standing rule, that no plaintiff shall proceed in ejectment to recover lands against a casual ejector without notice given to the tenant in possession (if any there be), and making him a defendant if he pleases.] The practice therefore was, to deliver a declaration to the tenant, and the plaintiff, in order to maintain

(a) Where there is no right of entry, it will be remembered, an ejectment cannot be maintained, vide sup. p. 493. But, as we have also seen, (ibid.) a person having a right to claim

the possession of a corporeal hereditament has now in every case (that of dower only excepted), and had always in most cases, a right of entry to enforce such claim.

the action, was bound, [in case of any defence, to make out four points before the court, viz. *title*, *lease*, *entry*, and *ouster*,] that is, first, [to show a good title in his lessor, which brought the matter of right entirely before the court; then that the lessor being seised or possessed by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee or plaintiff, did *enter* or take possession in consequence of such lease, and then, lastly, that the defendant *ousted* or ejected him. Whereupon he had judgment to recover his term and damages, and in consequence had a *writ of possession*, which the sheriff was to execute by delivering him the undisturbed and peaceable possession of his term.]

This method, save only as to the notice to the tenant, and the consequent defence of the action, must be still continued in due form and strictness, where an ejectment is brought upon what is called a *vacant possession* (*b*), that is, where the premises are left deserted by the entire abandonment of the tenant, and his present residence is unknown (*c*). [But as much trouble and formality were found to attend the actual making of the *lease*, *entry*, and *ouster*, a new and more easy method of trying titles by ejectment, where there is any actual tenant or occupier of the premises in dispute, was invented by the Lord Chief Justice Rolle (*d*), who then sat in the Court of Upper Bench, so called during the exile of King Charles II. This new method] (which is now considered as the *only* regular course where there is an occupier) [entirely depends upon a string of legal fictions: no actual lease is

(*b*) In this case, as in others, the lawful claimant, it will be recollected, may *enter*, if he can do so without a breach of the peace, vide sup. p. 359. But it is generally a safer course to proceed by ejectment, as on a vacant possession, or under the statutes 11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52; and 1 & 2 Vict. c. 74; as to

which, vide sup. p. 493.

(*c*) Adams, Ejectment, 173, 2nd edit. The case is the same where ejectment is brought in an inferior court, not having the power to frame and enforce rules for confessing lease, entry, and ouster. Ibid.

(*d*) Styl. Pract. Reg. 108, edit. 1657.

[made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal, for the sole purpose of trying the title.] To this end the claimant serves the tenant in possession with a declaration in ejectment, which may be done by delivering it to him personally, whether on the premises or elsewhere, or by delivering it personally to some member of his family or household, on the premises; and in either case it should be read over, or its purport explained (*e*). This declaration is drawn up in the form properly belonging to a declaration in trespass *quare clausum fregit*, and as if it were commenced (according to the old law of process) by original writ (*f*), though no writ is in fact ever issued; and must be intituled as of the court in which the action is intended to be brought, and (in point of date) as of the last preceding term, the service of it being usually in vacation (*g*). It complains, at suit of a fictitious plaintiff, for example, John Doe, against a fictitious defendant, for example, Richard Roe, that a lease for a term of years having been made to Doe by the claimant, and Doe having entered thereupon, the defendant, Roe, ousts him, for which Doe claims damages; and subjoined to this declaration is a *notice to appear*, addressed to the tenant in possession by name, in the form of a letter from Roe, informing him that he, Roe, is sued as a *casual ejector* only, and has no title to the premises, and will make no defence, and therefore advising him to appear in court in the next term (or, if the venue be in London or Middlesex, within the first four days of the next term,) and defend his own title, otherwise he, Roe, will suffer judgment to be had against him, and thereby the party addressed will be turned out of possession.

(*e*) Doe v. Roe, 1 Dowl. 428; Doe v. Roe, 2 Dowl. 199.

(*f*) It may also purport to be commenced by *bill*, vide sup. p. 405, n. But this is not usual.

(*g*) By Reg. Gen. T. T. 1 Will. 4,

if served before the first day of any term, it will have the same effect as it would formerly, if served before the first ^{first} ~~first~~ ^{essoign} day of that term. The service must not be on a Sunday.

[On receipt of this friendly caution, if the tenant in possession does not in due time take the proper steps to be admitted defendant in the stead of Roe, he is supposed to have no right at all; and upon judgment being had against Roe, the casual ejector, the real tenant will be turned out of possession by the sheriff.]

In the next term, however, he has the opportunity of procuring himself to be made defendant; for in the course of that term the real claimant, now called the *lessor of the plaintiff*, moves the court in the name of Doe, the plaintiff, for a rule for *judgment against the casual ejector* (*h*), upon which motion, supported by an affidavit of the due service of the declaration, the court makes a rule as of course for such judgment, unless the tenant shall appear and plead to issue within the time therein mentioned (*i*); and within that time the tenant in possession signs (by his attorney) what is called a *consent rule*, binding him to confess upon the trial of the cause, that he was at the time of the declaration in possession of the premises therein mentioned, or part of them (*k*), and also three out of the four requisites before noticed, viz. the *lease* of the lessor of the plaintiff, the *entry* of the plaintiff, and his *ouster* by himself the tenant in possession; and upon such consent rule being signed (as to which we may remark that it also binds the lessor of the plaintiff to pay the costs of the action in the event of judgment being obtained against the nominal plaintiff (*l*)), the tenant in possession is allowed by the court to enter an appearance in his own name and to plead the general issue, *not guilty*. After this, the issue is

(*h*) The rule may be moved for on any day in the term. Doe *d.* Lawford v. Roe, 1 Bing. N. C. 161.

(*i*) This, in town causes, is the fourth day from the date. In country causes the fourth day after the end of the term. Lush, 821.

(*k*) By Reg. Gen. M. 1820; vide 2 Cbit. Rep. 375.

(*l*) In Blackstone's time it was held that the plaintiff in ejectment ought to be a real person; 3 Bla. Com. 203; but he is now always a nominal one; and this arrangement as to the costs protects the defendant from the inconvenience which such a practice might otherwise occasion.

made up and sent down to trial, as in an action at the suit of Doe, plaintiff, on the demise of A. B. (the lessor of the plaintiff), against C. D. (the tenant in possession); and it is manifest, that, under these circumstances, the matter to be tried, or real and substantial issue in the cause, will turn merely upon the fourth requisite, viz. whether the lessor of the plaintiff had a good *title* to demise on the day of the supposed demise stated in the declaration. The lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for John Doe, the nominal plaintiff, who by this trial has proved the right of A. B. his supposed lessor (*m*).

The power of contesting this right, at the trial, belongs of course to the defendant, whom we have hitherto supposed to be the tenant in possession; but it is not always to the tenant in possession that it is exclusively intrusted; for [to prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by stat. 11 Geo. II. c. 19, on pain of forfeiting three years' rent, to give notice to their landlords when served with any declaration in ejectment; and any landlord,] which the courts have considered to extend to the heir, remainder-man, mortgagee, devisee in trust, and the like, [may by leave of the court be made a co-defendant to the action in case the tenant himself appears to it; or, if he makes default, though judgment must be then signed against the casual ejector, yet execution shall be stayed in case the landlord applies to be made a defendant, and enters into the common rule,—a right which indeed the

(*m*) By 11 Geo 4 & 1 Will. 4, c. 70, s. 38, the judge may certify his opinion on the back of the record, that a writ of possession ought to issue *immediately*, and upon such certificate a

writ of possession may accordingly issue, costs being taxed and judgment signed afterwards at the usual time, viz. in the next term.

[landlord had long before the provision of this statute (*n*): in like manner as (previous to the stat. Westm. 2, c. 3), if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession; lest, if judgment were had against the tenant, the estate of those behind should be turned to a naked right (*o*).]

It may happen, however, that the new defendant, whether landlord or tenant, or both, [after entering into the common rule, fail to appear at the trial, and to confess lease, entry, and ouster.] In that case the plaintiff Doe must indeed be then nonsuited, for want of proving those requisites; but judgment will in the end be entered against the casual ejector Roe; for the condition on which the tenant in possession, or his landlord, was admitted a defendant, is broken, and therefore the plaintiff is put again in the same situation as if he had never appeared at all; the consequence of which, we have seen, would have been that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out the tenant and delivered possession to John Doe. [The same process, therefore, as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.

The damages recovered in this action, though formerly its only intent,] in its original and proper shape of an action of trespass, are now usually, since it has been applied to the specific recovery of land, [very small and inadequate, amounting commonly to one shilling, or some other trivial sum. In order, therefore, to complete the remedy, when the possession has been long detained from him that had the right to it,] recourse is had, after the recovery in the ejectment, to an ordinary action of tres-

(*n*) Styl. Pract. Reg. 108, 111. Shamtitle, Burr. 1301.

265; Fenwick v. Gravenor, 7 Mod. (o) Bract. l. 5, c. 10, s. 14.

70; S. C. Salk. 257; Fairclaim v.

[*pass quare clausum fregit* to recover the mesne profits which the tenant in possession has wrongfully received; which action may be brought in the name of either the nominal plaintiff in the ejectment, or his lesser(*p*), against the tenant in possession], and that [whether he be made party to the ejectment, or suffer judgment to go by default(*q*). In this case the judgment in ejectment is conclusive evidence against the defendant for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits, the defendant may make a new defence(*r*).]

Such is the modern form of an ejectment, considered in a general point of view. In reference to this action, however, there exist some legislative provisions in favour of landlords, to which some notice is due before we conclude the chapter.

First, by the common law, where there is a proviso for re-entry by the landlord in the case of rent remaining in arrear, he cannot have the benefit of the proviso (unless it be accompanied by an express stipulation to that effect) without making a formal demand upon the premises out of which the rent issues; which demand must also be of the precise sum claimed, and made at the precise time when it became due(*s*); but to obviate these niceties, it is provided by 4 Geo. II. c. 28, in all cases between landlord and tenant, that if half-a-year's rent be in arrear, and there be a right to re-enter for the non-payment, and no sufficient distress be found(*t*), the landlord may serve a declaration in ejectment, and affix the same on the door; or if there be no house, then upon some notorious part of

(*p*) But if brought in the name of the nominal plaintiff, security must be given for the *costs*.

(*q*) *Aslin v. Parkin*, Burr. 668.

(*r*) The defendant may plead the Statute of Limitations, and by that means protect himself from the pay-

ment of all mesne profits except those which have accrued in the last six years.—*Christian's Bl.* vol. iii. p. 206.

(*s*) See *Duppa v. Mayo*, 1 Saund. (Wms.) 287.

(*t*) *Doe v. Wandlass*.

the premises, which shall stand in the place of a formal demand and re-entry. And a recovery in such ejectment shall be final and conclusive, both in law and equity, unless the rent and all costs be paid or tendered within six calendar months afterwards.

Again, by 1 Geo. IV. c. 87, it is enacted that when the interest of any tenant holding under lease or agreement in writing for term of years certain, or from year to year, shall have expired or been determined by regular notice to quit, and, after lawful demand in writing served personally or left at the tenant's usual place of abode, possession shall be refused, the landlord, at the foot of his declaration in ejectment brought to recover the premises, may address a notice to the tenant, requiring him to appear on the first day of the next term (or, in the counties palatine, on the 1st day of the next assizes, or at the court day, or at the usual period for appearance to process then next following, as the case may be), there to be made defendant, and to find two sureties (if it should be so ordered by the court) for payment of the costs and damages to be recovered; and the landlord may move the court, not only that such sureties be given, but that the tenant, besides the common rule, shall undertake, in case a verdict pass for plaintiff, to give plaintiff a judgment to be entered up of the term next preceding the trial; or if the action be brought in the counties palatine, then of the assizes or court day (as the case may be) at which the trial shall be held. It has been adjudged, however, that these provisions are only intended to apply to the case where the landlord's title is undisputed (*u*).

Moreover by the same statute, whenever it shall appear in *any* ejectment between landlord and tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of defendant's appearance or confession of lease, entry and ouster; but on the production of the consent rule, the

(*u*) *Doe d. Sanders v. Roe*, 1 Dowl. 4.

judge shall permit the plaintiff to prove his right, and also to go into evidence as to the *mesne* profits, and the jury finding for the plaintiff, shall give their verdict on the whole matter, both as to recovery of possession and *mesne* profits.

Lastly, by 11 Geo. IV. & 1 Will. IV. c. 70(*x*), in all ejectments in the superior courts by landlord against tenant, when the tenancy shall expire, or the right of entry accrue in or after Hilary or Trinity Term, it shall be lawful for the lessor of the plaintiff, at any time within ten days after the tenancy expires, or the right of entry accrues, to serve a declaration in ejectment entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or vacation, with notice subscribed, to appear and plead in ten days; and proceedings shall be had, as if such declaration had been duly served before the preceding term; provided always, that at least six days clear notice of trial shall be given, and also that the defendant shall be at liberty to apply to a judge for farther time, or for staying the proceedings, or postponing the trial until the next assizes. But this statute does not apply to lands in London or Middlesex (*y*).

(*x*) Sect. 36.

(*y*) *Doe d. Norris v. Roe*, 1 Dowl. 547.

CHAPTER XII.

OF OTHER REMEDIES IN THE COURTS OF
COMMON LAW.

WE have now taken a view of the method of proceeding in all actions, whether regular or irregular (if those terms may be used), which are known in the modern practice.

The common law however affords, in certain cases of civil injury, other remedies, of a nature generically different from an action, and to these we propose to devote the following chapter. But as the proceedings with them are always introduced by way of application to the court, technically called *motion*, it will be proper to premise some explanation as to the nature of a motion in general. And here we shall confine ourselves to applications to the court in *banc*, to which alone the name of motions is properly applied, not deeming it necessary to take any particular notice of such applications as are made to a *single judge at chambers*, a branch of practice more summary in its nature than the former, and turning for the most part on matters of subordinate importance.

A motion, then, is an application made to the judges *virâ voce* in open court, and it may be either incidental to an action—a relation in which we have already had occasion sometimes to refer to it—or it may be wholly unconnected with that kind of remedy. In the superior courts it can be made by none but a counsel or barrister, to the exclusion of attorneys; and the practice of every court requires that it should in general be supported by *affidavit* of the matter of fact on which it is founded. Its object, in a

general point of view, is to obtain an order (called in the superior courts of common law a rule (*a*)), directing some act to be done in favour of the applicant; which rule, when obtained, is served (*b*) upon the party by whom the act is to be performed. The rule so moved for, is in its form usually a rule to *show cause* (otherwise called a rule *nisi*), commanding the party, on a certain day therein named, to show cause to the court, why he should not perform the act, or submit to the terms therein set forth; but in some cases, where the right to the relief prayed for is very clear, it is a rule *absolute in the first instance*, commanding the thing to be done without the appointment of any day to show cause. Upon the day appointed by the rule *nisi*, the counsel for the party on whom it was served accordingly appears, and is heard in opposition to it; and the counsel by whom it was moved, having been afterwards heard in reply, the court either discharges the rule or makes it absolute, as the case may be, and that upon the terms either that the costs of the application be paid by one of the parties to the other, or without costs (as between the parties), as may appear most equitable under the circumstances of the case. But upon failure of the parties served to appear in opposition to the rule, it is made absolute, as a matter of course. Upon its being made absolute or discharged (as the case may be), a new rule to that effect is then served by the successful or unsuccessful party, who is bound to obey it upon peril of an attachment as for a contempt, a writ issued by the court in vindication of its own authority, and under which the party is liable to coercion by the arrest of his person.

We shall now resume the main subject of the chapter, by the consideration of such of the remedies afforded at

(a) All rules are intituled as of some term. If delivered out in vacation, they are by Reg. Gen. II. 1 Viet. to be dated the day of the month and week on which delivered out, but in-

tituled of the term preceding.

(b) As to the time and manner of service of rules, see Reg. Gen. II. 2 Will. 4, r. 50, 51.

common law as are distinct in their nature from an action. These chiefly consist of what are called *prerogative writs*, [which do not issue as of mere course without showing some probable cause why the extraordinary powers of the crown are called in to the party's assistance (c),] and are principally as follows :—

I. The writ of *Procedendo*. This [issues out of the Court of Chancery, when judges of any subordinate court do delay the parties, for that they will not give judgment, either on the one side or the other, when they ought so to do (d).] In such case a writ of *procedendo ad iudicium* [shall be awarded, commanding the inferior court in the king (or queen's) name, to proceed to judgment, but without specifying any particular judgment, for that, if erroneous, may be set aside by writ of error or false judgment; and upon farther neglect or refusal, the judges of the inferior court may be punished for their contempt by writ of attachment, returnable] in the Courts at Westminster. A *procedendo* also lies where an action has been removed from an inferior to a superior court by *habeas corpus* or *certiorari*, to be hereafter mentioned, or any like writ, and it appears to the superior court that it was removed on insufficient grounds (e). And by 21 Jac. I. c. 23, a suit once so remanded, shall never afterwards be removed before judgment, into any court whatsoever.

II. The writ of *Mandamus*. The power of issuing this belongs in general exclusively to the Court of King's (or Queen's) Bench (f). [It is a high prerogative writ, of a

(c) 3 Bl. Ccm. 132. In *R. v. Cowle*, Burr. 855, prerogative writs are also distinguished from writs ministerially directed, viz. those issued to the sheriff; the prerogative writs being generally directed to no sheriff or minister of the court; but to the public or private parties whose acts are the subject

of complaint.

(d) F. N. B. 153, 240.

(e) 21 Jac. I. c. 23; Jac. Diet. *Procedendo*.

(f) There is an exception to this in the case of a *mandamus* to examine witnesses in India and other British dominions in foreign parts, issued under

[most extensive remedial nature,] and is in its form a command issuing in the queen's name from the Court of Queen's Bench, and [directed to any person, corporation, or inferior court of judicature within the crown's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of Queen's Bench has previously determined, or at least supposes, to be consonant to right and justice.] In its application it may be considered as confined to cases where relief is required in respect of the infringement of some *public* right or duty (*g*), and where no effectual relief can be obtained in the ordinary course of an action at law (*h*). Such is the general principle; but as to the specific instances in which the writ will be granted, they are much too numerous for complete detail (*i*). We may remark, however, that (among other cases) it lies to compel the admission or restoration of the applicant [to any office or franchise of a public nature, whether spiritual or temporal, to academical degrees, to the use of a meeting house, or the like,] and that it will be also granted [for the production, inspection, or delivery of public books and papers, for the surrendering of the regalia of a corporation, to oblige bodies corporate to affix their common seal, or to compel the holding of a court,] or to proceed to an election in corporate and other public offices (*k*). In ad-

authority of 13 Geo. 3, c. 63, s. 44, and 1 Will. 4, c. 22, s. 1. The *mandamus* in such cases may be awarded by any of the superior courts at Westminster.

(*g*) *R. v. Bank of England*, 2 B. & Ald. 622.

(*h*) *R. v. Bishop of Chester*, 1 T. R. 396; *R. v. Archbishop of Canterbury*, 8 East, 219; *Ex parte Robins*, 1 W. W. & H. 578; *R. v. Nottingham Old Water Works Company*, 6 A. & El. 355; *R. v. Bristol Dock Company*, 2 A. & E. N. S. 69. It is

no objection, however, to granting a *mandamus*, that the party against whom the complaint is made may be proceeded against by *indictment*. *R. v. Severn Railway Company*, 2 B. & Ald. 646.

(*i*) A copious enumeration of them will be found in 1 Ch. Gen. L. 789.

(*k*) 11 Geo. 1, c. 4; and 7 Will. 4 & 1 Vict. c. 78, s. 24; *R. v. Mayor, &c. of London*, 1 T. R. 146; *R. v. Leyland*, 3 M. & S. 184; *R. v. Norwich*, 1 B. & Adol. 310.

dition to which we may notice, as another important application of this writ, [that it issues to the judges of any inferior court, commanding them to do justice according to the power of their office, whenever the same is delayed. For it is the peculiar business of the Court of Queen's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them, and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice. A mandamus may therefore be had to the courts of the city of London to enter up judgment, or to the spiritual courts to grant an administration, or the like.

This writ is granted on a suggestion, by the oath of the party injured, of his own right and the denial of justice below (*l*)—whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made,] except under particular circumstances, where a rule will be granted absolute in the first instance (*m*), [directing the party complained of to show cause why a writ of mandamus should not issue, and if he shows no sufficient cause,] and does not submit without contest to the application, [the writ itself is issued at first in the alternative either to do this or signify some reason to the contrary; to which a *return* or answer must be made at a certain day.]

[If the person to whom the writ is directed makes no return he is punishable for his contempt by attachment.] If, on the other hand, he makes a return, and it be found either insufficient in law, or false in fact, there then issues in the second place a *peremptory* mandamus to do the

(*l*) Unless there has been a distinct refusal to do that which it is the object of the mandamus to enforce, the writ will not be granted. *R. v. Brecknock, &c. Company*, 3 A. & E. 217.

(*m*) *R. v. Archdeacon of Lichfield*, 5 Nev. & M. 42; *Ex parte Penraddock*, 1 Har. & W. 347; *R. v. Fox*, 2 Ad. & El. N.S. 246; *R. v. Churchwardens of Manchester*, 7 Dowl. 707.

thing absolutely, [to which no other return will be admitted (*n*) but a certificate of perfect obedience and due execution of the writ.] The sufficiency of the return in *point of law* was formerly determined, unless a special argument were ordered, in a summary way upon motion; but as to the truth of its allegations *in point of fact*, it was a rule that this could not be investigated by any farther proceeding on the mandamus—the complaining party having no remedy in case the facts were untruly alleged, but to bring an action on the case for a false return, in which, if he obtained a verdict, he recovered [damages equivalent to the injury sustained, together with a peremptory mandamus to the defendant.] But by 9 Ann. c. 20, in a mandamus for determining the right to a corporate office, and now by 1 Will. IV. c. 21, in *all* cases of mandamus [the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return, and after judgment obtained for the prosecutor, he shall have a peremptory writ of mandamus to compel his admission or restitution—which latter, in case of an action, is effected by a writ of restitution (*o*).] So that now the writ of mandamus is (from the period at least of its return) assimilated to an action; and the more closely because by the same acts it is also provided, that the prosecutor, if successful, shall recover damages, and that the successful party shall, in all cases, upon judgment after issue joined or by default, be entitled to his costs (*p*). In addition to which it has been recently enacted by 6 & 7 Vict. c. 67, that the prosecutor objecting to the validity of the return, shall do so by way of de-

(*n*) *R. v. Ledgard*, 1 Ad. & El. N. S. 616.

(*o*) 11 Rep. 79.

(*p*) As to the course of proceeding on mandamus, see *R. v. Oundle*, 1 A. & E. 283. By 1 Will. 4, c. 21, s. 8, the costs of the application for a man-

damus, whether granted or refused, and the costs of the writ, where issued and obeyed, are in the discretion of the court. See *S. C.*; and *R. v. Eastern Counties Railway Company*, 2 A. & E. N. S. 578; *R. v. St. Pancras*, 2 Dowl. N. S. 955.

murrer to the same, in like manner as in personal actions, and thereupon the writ, return and demurrer shall be entered on record, and the court shall adjudge either that the return is valid in law or that it is not valid in law, or that the writ of mandamus itself is not valid in law; and if it adjudge that the writ is valid, but the return invalid, shall award a peremptory mandamus; and shall also in any event award costs to be paid to the successful party. The same statute also provides that either party shall be at liberty in every case where judgment is given against him upon a mandamus, whether after demurrer or otherwise, to prosecute a writ of error thereon, according to the ordinary course of a writ of error in personal actions (*q*).

Besides these provisions with respect to mandamus we may notice the enactment of 1 & 2 Will. IV. c. 58, s. 8, intended to afford relief to officers and other persons to whom such writ is directed to issue, commanding them to admit to offices or do or perform other matters in respect of which they claim no right or interest. It is provided in favour of such persons, that it shall be lawful for the court to which application is made for the writ of mandamus, to relieve them from the liabilities incident to the execution thereof, by calling upon any other person having or claiming any interest in the matter of such writ, to appear and show cause against the issuing of the same, and thereupon to make such rules and orders between all parties as the circumstances of the case may require.

III. The writ of *Prohibition*.

[A prohibition is a writ issuing properly only out of the Court of King's (or Queen's) Bench (*r*); but for the further-

(*q*) By 6 & 7 Vict. c. 89, s. 5, it is provided, both as to mandamus and quo warranto, in regard to offices and boroughs under the Municipal Corporation Act, that ten days' notice to the opposite party may be given by the party making application for such remedy, and that thereupon cause may be

shown, and the rule for a mandamus or information made absolute in the first instance; and if the court think proper, a peremptory mandamus may be issued in the first instance.

(*r*) *Company of Horners*, 2 Rol. Rep. 471.

[ance of justice, it may now also be had in some cases out of the Court of Chancery, Common Pleas, or Exchequer(s); directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a surmise either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. This writ may issue either to inferior courts of common law, as to the courts of the counties palatine, if they hold plea of land or other matters not lying within their respective franchises (*t*); to the county courts or courts baron, where they attempt to hold plea of any matter of the value of forty shillings (*u*); or it may be directed to the courts christian, the university courts, the court of chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction, as if the first should attempt to try the validity of a custom pleaded (*x*), or the latter a contract made or to be executed within this kingdom. Or if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England (*y*); as where they require two witnesses to prove the payment of a legacy, a release of tithes (*z*), or the like; in such cases also a prohibition will be awarded (*a*). For as the

(*s*) Hutton's case, Hob. 27; 1 P. Wms. 476; Palmer, 523. See *Ex parte Smyth*, 1 Tyr. & Gr. 225; and *Ex parte Tucker*, in re Inman, 1 Man. & G. 529; *Tucker v. Tucker*, 4 Man. & G. 1074.

(*t*) *Vaughan v. Evans*, Ld. Raym. 1408.

(*u*) Finch, L. 451.

(*x*) *Vanaere v. Spleen*, Carth. 33. But the spiritual courts have power to construe a *statute*, the effect of which incidentally comes before them in the course of a proceeding where they have jurisdiction. *Hall v. Maule*, 7 Ad. & El. 721.

(*y*) But if sentence has been given

in the court below, the court to which application is made for a prohibition will presume that there was no excess of jurisdiction, unless such excess be distinctly proved, or be apparent on the face of the proceedings. *Vanaere v. Spleen*, ubi sup.; *Hart v. Marsh*, 5 Ad. & El. 591.

(*z*) *Mallory v. Marriott*, Cro. Eliz. 667; Hob. 188.

(*a*) But a prohibition will not be awarded in reference to a mere point of *practice*, where the court has jurisdiction on the general subject of the cause. *Ex parte Smyth*, 1 Tyr. & G. 227; *Jolly v. Baines*, 12 A. & E. 201.

[fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction, it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition. And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them to punish them for the contempt, at the discretion of the court that awarded it (*b*); and an action will lie against them, to repair the party injured in damages (*c*).

So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained, between the temporal courts and the spiritual, concerning the writ of prohibition and the proper objects of it; even from the time of the constitutions of Clarendon, made in opposition to the claims of Archbishop Becket, in 10 Hen. II., to the exhibition of certain articles of complaint to the king by Archbishop Bancroft, in 3 Jac. I., on behalf of the ecclesiastical courts; from which, and from the answers to them, signed by all the judges of Westminster Hall (*d*), much may be collected concerning the reasons of granting, and methods of proceeding upon, prohibitions. A short summary of the latter is as follows. The party aggrieved in the court below applies to the superior court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom;] and

(*b*) F. N. B. 40.

(*c*) 2 Inst. 601--618.

(*d*) As to prohibition, see the following modern cases: *Ex parte Tucker*, in *re Inman*, 1 Man. & G. 519; *Tucker*

v. Tucker, 4 Man. & G. 1074; *Hallack v. Cambridge University*, 1 Ad. & E. N. S. 593; *Re Dean of York*, 2 Ad. & El. N. S. 1.

this used formerly to be done by filing, as of record, what was called a *suggestion*, containing a formal statement of the facts; but now by 1 Will. IV. c. 21, it is provided, that it shall not be necessary to file any suggestion, but that an application for a writ of prohibition may be made by *affidavits* only, that is, in the way of an ordinary motion, by a rule to show cause; upon which, if the matter alleged appear to the court, upon the showing cause, [to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition;] that is, to deliver a declaration against the other, setting forth in a concise manner so much of the proceeding in the court below as may be necessary to show the ground of the application, and praying that a writ of prohibition may issue (*e*); and this used formerly to be connected with an allegation that the party sued on behalf of the crown as well as of himself, and with a supposition or fiction (which was not traversable (*f*)), that the defendant had proceeded in the suit below, notwithstanding a writ of prohibition. But by the statute just mentioned, the use of these forms is now expressly abolished; and it is provided, that to this declaration the party defendant may demur, or plead such matters by way of traverse or otherwise as may be proper to show that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do, or do not issue, as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to re-

(*e*) 1 Will. 4, c. 21, s. 1.

(*f*) Barn. Not. 4to. 148.

cover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary to entitle the plaintiff to costs. The effect of the legislative provisions here cited has consequently been to place prohibitions, after a rule to declare has been obtained, upon a footing substantially of an action, and in this respect it exhibits, we see, a close resemblance to a *mandamus* (*g*).

Another remedy analogous to these is, IV., the writ of *quo warranto*. [This writ is in the nature of a writ of right for the crown (*h*), against him who claims or usurps any office (*i*), franchise, or liberty (*k*), to inquire by what authority he supports his claim, in order to determine the right (*l*). It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. This was originally returnable before the king's justices at Westminster (*m*), but afterwards only before the justices in eyre, by virtue of the statutes of *quo warranto*, 6 Edw. I. c. 1, and 18 Edw. I. st. 2 (*n*); but since those justices have given place to the king's temporary commissioners of assize (*o*), the judges on the several circuits, this branch of the statutes lost its effect (*p*); and writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's (or queen's) justices at Westminster. And in case of judgment for the defendant, he shall have an allowance of

(*g*) For the former course of proceeding in prohibition, see Com. Dig. Prohibition (H.); Bac. Ab. Prohibition.

(*h*) *R. v. Shepherd*, 4 T. R. 381.

(*i*) As to offices, vide sup. p. 18.

(*k*) *R. v. Archdall*, 8 Ad. & El. 281; and as to franchises and liber-

ties, vide sup. vol. ii. p. 14.

(*l*) Finch, L. 322; 2 Inst. 282.

(*m*) Old Nat. Brev. fol. 107, edit. 1534.

(*n*) 2 Inst. 498; Rast. Entr. 540.

(*o*) Vide sup. 421.

(*p*) 2 Inst. 498.

[his franchise; but in case of judgment for the crown, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's (or queen's) hands, to be granted out again to whomsoever he shall please, or, if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of *ouster*, to turn out the party who usurped it (*q*).

The judgment on a writ of quo warranto (being in the nature of a writ of right) is final and conclusive even against the crown, which, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by *information* filed in the Court of Queen's Bench by the attorney-general, in the nature of a writ of quo warranto; wherein the process is speedier, and the judgment not quite so decisive. This is properly a *criminal* method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the crown; but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor (*r*); the fine being nominal only (*s*).

During the violent proceedings that took place in the latter end of the reign of King Charles II. it was, among other things, thought expedient to new model most of the corporation towns in the kingdom; for which purpose many of those bodies were persuaded to surrender their charters, and informations in the nature of quo warranto were

(*q*) *R. v. Stanton*, Cro. Jac. 259; *R. v. Mayor of London*, 1 Show. 280.

(*r*) It is discretionary, however, in the court to grant or withhold a quo warranto information in such cases. *R. v. Parry*, 6 Ad. & El. 810.

(*s*) See the difference in the application of mandamus and quo warranto respectively illustrated in the case of *R. v. Oxford*, 6 Ad. & El.

349; *R. v. Winchester*, 7 Ad. & El. 215; *R. v. Phippen*, *ibid.* 970.

After an office is determined, an information in quo warranto to try the title thereto will not be granted. *Re Harris*, 6 Ad. & E. 475. An information in quo warranto does not lie for exercising the office of guardian to a poor law union. *Re Aston Union*, *ibid.* 784.

[brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and, during their state of anarchy, the crown named all their magistrates. This exertion of power, though perhaps *in summo jure* it was for the most part strictly legal, gave a great and just alarm; the new modelling of all corporations being a very large stride toward establishing arbitrary power, and therefore it was thought necessary at the Revolution to bridle] the prerogative, as regards the city of London at least, by the prohibitory provision to that effect referred to in a former part of this volume (t).

[This proceeding is, however, now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Anne, c. 20, which permits an information in the nature of quo warranto to be brought with leave of the court, at the relation of any person desiring to prosecute the same, (who is then styled the *relator* (u),) against any person usurping, intruding into, or unlawfully holding any franchise, or office in any city, borough, or town corporate (x); provides for its speedy determination (y), and directs that if the de-

(t) Vide sup. p. 188.

(u) By Reg. Gen. M. T. 3 Vict. (vide 11 A. & E. 2) no rule shall hereafter be granted for filing any information in the nature of a quo warranto, unless, at the time of moving, an affidavit be produced, by which some person or persons shall depose, that such motion is made at his or their instance, as relator or relators; and that such person or persons shall be deemed to be the relator or relators in case such rule shall be made absolute, and shall be named as such relator or relators in

such information in case the same shall be filed, unless the court shall otherwise order. See *R. v. Hedges*, 11 Ad. & El. 163; *R. v. Anderson*, 2 Ad. & E. N. S. 740. As to who may be relator, *R. v. Parry*, 6 Ad. & El. 810; *R. v. Greene*, 2 Ad. & E. N. S. 460.

(x) But an information in quo warranto cannot be brought against a body corporate at large for acting as a corporation, unless at the instance of the attorney general. *R. v. White*, 5 Ad. & El. 613.

(y) By 6 & 7 Vict. c. 89, s. 5, the

[fendant be convicted, judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit.] By 32 Geo. III. c. 58, intituled “ An Act for the Amendment of the Law upon Informations in the nature of Quo Warranto,” it is also provided that the defendant may plead in bar to any information in quo warranto in respect of any office in a town corporate, whether exhibited by leave of the court or by the attorney general on behalf of the crown, that he first took upon himself such office six years or more before the exhibiting the information, which plea may be pleaded with any other pleas that the court may allow, and may be met by a replication that a forfeiture of such office happened within the period of that limitation; and farther, that the title of the defendant derived under any election shall not be affected on account of defect in the title of the person electing, provided the elector shall have been in the exercise *de facto* of his office six years previous to the information. And by the late statutes 7 Will. IV. & 1 Vict. c. 78 (z), and 6 & 7 Vict. c. 89, it is farther enacted, that every application to the Queen’s Bench, for the purpose of calling upon any person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess in any borough within the Municipal Corporation Act, shall be made before the end of twelve months after the election of the defendant, or the time when he shall become disqualified; and that no election of any mayor shall be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor to which he may have been previously elected, unless application shall have been made to the Court of Queen’s Bench, calling upon such person to show cause by what warrant he claims to exercise such office of alderman or councillor within twelve months after his election thereto; and that every election to the office

court may order the venue in informations in quo warranto to be laid in Middlesex or London, and the trial to

take place therein. Et vide sup. p. 684, n.

(z) Sect. 23.

of mayor, alderman, councillor, or any other corporate officer within the said boroughs which shall not have been called in question within twelve months after such election, shall be deemed good and valid.

V. The Writ of *Habeas corpus* (a). This is the most celebrated writ in the English law, and the great remedy which it has provided for the violation of the right of personal liberty. We had occasion, in the first volume (b), to make some remarks upon this writ, but a more particular detail of its history, and the practice connected with it, may here be acceptable.

In the first place, we may remark that the vindication of liberty, though the principal, is not the only purpose to which it is applied; for, of the *habeas corpus* [there are various kinds made use of by the courts at Westminster for removing prisoners from one court to another for the more easy administration of justice. Such is the *habeas corpus ad respondendum*, when a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner and charge him with this new action in the court above (c). Such is that *ad satisfaciendum*, when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with the process of exe-

(a) As to the remedy by action for false imprisonment, vide sup. p. 481. Blackstone notices, besides the *habeas corpus*, three other writs for removing the injury of false imprisonment: 1st. The writ of *mainprize*, *manucaptio*, commanding the sheriff to take sureties for the appearance of the prisoner, usually called *mainperners*, and to set him at large; 2nd, The writ *de odio et atia*, commanding the sheriff to inquire whether a prisoner charged with murder was committed on general cause of suspicion, or merely *propter odium et*

atiam, for hatred and ill will, with the view, if the latter was found the case, of afterwards issuing another writ to admit him to bail; 3rdly, The writ *de homine replegiando*, commanding the sheriff to replevy a man out of custody in the same manner that chattels taken in distress may be replevied, upon security given that he shall answer any charge against him; 3 Black. Com. 128. All these remedies however have long fallen into complete disuse.

(b) Vide sup. vol. i. p. 135.

(c) Jones's case, 2 Mod. 198.

[cution (*d*). Such also are those *ad prosequendum, testificandum, deliberandum, &c.* which issue when it is necessary to remove a prisoner in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed (*e*). Such is, lastly, the common writ *ad faciendum et recipiendum*, which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated a *habeas corpus cum causâ* (*f*),) to *do and receive* whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right without any motion in court (*g*), and it instantly supersedes all proceedings in the court below; but in order to prevent the surreptitious discharge of prisoners, it is ordered by statute 1 & 2 P. & M. c. 13, that no *habeas corpus* shall issue to remove any prisoner out of any gaol unless signed by some judge of the court out of which it is awarded; and, to avoid vexatious delays, by removal of frivolous causes, it is enacted by 21 Jac. I. c. 23, that where the judge of an inferior court of record is a barrister of three years standing no cause shall be removed from thence by *habeas corpus*, or other writ after issue or demurrer] unless joined within six weeks after appearance; [that no cause, if once remanded to the inferior court by writ of *procedendo* or otherwise, shall ever afterwards be again removed; and that no cause] in which the freehold or inheritance, or title of land, lease, or rent, shall not be brought in question, [shall be removed at all if the debt and damages

(*d*) 2 Lilly, Pract. reg. 4.

(*e*) As to writs of *habeas corpus ad testificandum, &c.* see 43 Geo. 3, c. 140, and 44 Geo. 3, c. 102. See also *Ex parte Griffiths*, 5 B. & A. 730.

(*f*) As to writs of *habeas corpus cum causâ*, see *Bowerbank v. Walker*, 2

Chit. 517; *Clack v. Dixon*, 3 M. & S. 93; *Lawes v. Hutchinson*, 5 Tyr. 236; *Mitchell v. Mitchenham*, 1 B. & C. 513.

(*g*) *Penrice and Wynn's case*, 2 Mod. 306.

[laid in the declaration do not amount to five pounds(*h*). And by statute 19 Geo. 3, c. 70, no cause under the value of ten pounds], (which was by 7 & 8 Geo. 4, c. 71, s. 6, extended to causes under the value of twenty pounds(*i*)), [shall be removed by habeas corpus or otherwise into any superior court, unless the defendant, so removing the same, shall give special bail for payment of the debt and costs.

But the most important species of habeas corpus is that of *habeas corpus ad subjiciendum* (*h*), which is the remedy used for the deliverance from illegal confinement. This is directed to any person who detains another in custody, and commands him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*,—to do, submit to and receive whatsoever the judge or court awarding such writ, shall consider in that behalf (*l*). This is a high prerogative writ,] and issues out of any of the superior courts at Westminster, including the Court of Chancery (*m*), not only in term time, but also during the vacation (*n*), and runs into all parts of the Queen's dominions; [for the Queen is at all times entitled to have an account why the liberty of any of her subjects is restrained (*o*), whenever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon (*p*), unless

(*h*) Et vide 12 Geo. 1, c. 29.

(*i*) It may be observed here, that by the recent act of 7 & 8 Vict. c. 96, s. 57, no person can now be taken in execution in any superior or inferior court for a debt not exceeding 20*l*.

(*k*) As to writs of *habeas corpus ad subjiciendum*, &c. see *R. v. Greenhill*, 4 Ad. & E. 624; *Easton's case*, 12 Ad. & E. 645; *R. v. Batcheldor*, (re Canadian Prisoners), 1 Per. & D. 516; *S. C. nom. Leonard Watson's case*, 9 Ad. & E. 731; *Ford v. Nas-sau*, 1 Dowl. N. S. 631; in *re Parker*,

5 Mee. & W. 32; *Jones v. Danvers*, *ibid.* 234.

(*l*) *State Trials*, viii. 142.

(*m*) 31 Car. 2, c. 2, s. 10; 56 Geo. 3, c. 100, s. 2. The Lord Chancellor can issue the writ of habeas corpus at common law in vacation; *Crowley's case*, 2 Swanst. 1.

(*n*) See *Wood's case*, 3 Wils. 172; *Leonard Watson's case*, 9 Ad. & E. 731.

(*o*) *Bourn's case*, Cro. Jac. c. 543.

(*p*) *R. v. Clarke*, Burr. 606.

[the term should intervene, and then it may be returned in court(*h*).] It is necessary to apply for this writ by motion to the court, or application to a judge (as the case may be), supported by affidavit of the facts(*i*). [For, as was argued by Lord Chief Justice Vaughan(*j*), “it is granted on motion, because it cannot be had of course; and therefore there is no *necessity* to grant it, for the court ought to be satisfied that the party hath a probable cause to be delivered.” And this seems the more reasonable, because (when once granted) the person to whom it is directed, can return no satisfactory excuse for not bringing up the body of the prisoner(*k*). So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king’s service, a wife, a child, a relation, or a domestic, confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out a habeas corpus, though sure to be remanded as soon as brought up to the court.

And therefore Sir Edward Coke, when chief justice, did not scruple in 13 Jac. I. to deny a habeas corpus to one confined by the Court of Admiralty for piracy, there appearing, upon his own showing, sufficient grounds to confine him(*l*). On the other hand, if a probable ground be shown that the party is imprisoned without just cause(*m*), and therefore hath a right to be delivered, the writ of habeas corpus is then a writ of right, which “may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by command of the king, privy council or any other(*n*).”

In a former part of these Commentaries(*o*) we expatiated

(*h*) Ibid. 460.

also White v. Wiltshire, 2 Roll. Rep. 138.

(*i*) Hobhouse’s case, 3 B. & Ald.

420.

(*m*) 2 Inst. 615.

(*j*) Bushel’s case, 2 Jon. 13.

(*n*) Com. Journ. 1 Apr. 1628.

(*k*) Bourn’s case, Cro. Jac. 543.

(*o*) Vide sup. vol. i. p. 135.

(*l*) R. v. Marsh, 3 Bulstr. 27; see

[at large upon the personal liberty of the subject. This was shown to be a natural inherent right, which could not be surrendered or forfeited, unless by the commission of some great and atrocious crime, and which ought not to be abridged in any case without the special permission of law. A doctrine coeval with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest; asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *Magna Charta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases is inconsistent with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful.

This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court upon a habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

And yet, early in the reign of Charles I., the Court of King's Bench, relying on some arbitrary precedents (and those, perhaps, misunderstood), determined (*p*) that they could not, upon a habeas corpus, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council. This drew on

[a parliamentary inquiry, and produced the *petition of right*, 3 Car. I., which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year Mr. Selden and others were committed by the lords of the council in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge wasailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment; the chief justice, Sir Nicholas Hyde, at the same time declaring (*q*), that "if they were again remanded for that cause, perhaps the court would not afterwards grant a habeas corpus, being already made acquainted with the cause of the imprisonment." But this was heard with indignation and astonishment by every lawyer present; according to Mr. Selden's own (*r*) account of the matter, whose resentment was not cooled at the distance of four-and-twenty years.

These pitiful evasions gave rise to the statute 16 Car. I. c. 10, s. 8, whereby it is enacted, that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of habeas corpus, upon demand or motion made to the Court of King's Bench or Common Pleas; who shall thereupon, within three court days after the return is made, examine and determine the legality of

(*q*) State Trials, vii. 240.

(*r*) "*Etiam judicium tunc primarius, nisi illud faceremus, rescripti illius forensis, qui libertatis personalis omnimodæ vindex legitimus est fere solus, usum omnimodum palam pronun-*

tiavit (sui semper similis) nobis perpetuo in posterum denegandum. Quod, ut odiosissimum juris prodigium, scientioribus hic universis censitum." (Vindic. Mar. Claus. edit. A.D. 1653.)

[such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still, in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at Guildhall (*s*), new shifts and devices were made use of to prevent his enlargement by law; the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, &c. whereby the prisoner was discharged at the Old Bailey (*t*). Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody.] These abuses at length [gave birth to the famous Habeas Corpus Act, 31 Car. II. c. 2, which is frequently considered as another *Magna Charta* (*u*) of the kingdom; and by consequence and analogy has also, in subsequent times, reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty (*x*).

The statute itself enacts, 1. That on complaint and re-

(*s*) State Trials, vii. 471.

(*t*) See Crowley's Case, 2 Swanst. 1.

(*u*) See *supra*, vol. i. p. 172.

(*x*) Bishop Burnet relates a circumstance respecting the habeas corpus act, which is more curious than creditable; but though we cannot be induced to suppose that this important statute was obtained by a jest and a fraud, yet the story proves that a very formidable opposition was made to it at that time. "It was carried (says he) by an odd artifice in the House of Lords. Lord Grey and Lord Norris

were named to be the tellers; Lord Norris, being a man subject to vapours, was not at all times attentive to what he was doing, so a very fat lord coming in, Lord Grey counted him for ten as a jest at first, but seeing Lord Norris had not observed it, he went on with this misreckoning of ten; so it was reported to the House, and declared that they who were for the bill, were the majority, though it indeed went on the other side; and by this means the bill past." 1 Burnet, Hist. Ch. ii. 485.—CH.

[quest in writing by or on behalf of any person committed and charged with any *crime* (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a habeas corpus for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature (*y*). 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (specified in the act,) shall for the first offence forfeit £100, and for the second offence £200, to the party grieved, and be disabled to hold his office (*z*). 5. That no person, once delivered by habeas corpus, shall be recommitted for the same offence, on penalty of £500. 6. That every person committed for treason or felony shall, if he requires it, the first week of the next term, or

(*y*) And the writ where issued in vacation, returnable immediately before a judge at chambers, does not expire by the commencement of the term. *Rex v. Shebbeare*, 1 Burr. 460.

(*z*) A person, sent over from Ireland under a warrant from the secre-

tary of state from Ireland, charged with any offence, and committed to prison until he can be brought before a judge, is entitled to a copy of the warrant, under the habeas corpus act, after it has been demanded. *Sedley v. Arbouin*, 3 Esp. 194.

[the first day of the next session of *oyer* and *terminer*, be indicted in that term or session, or else admitted to bail; unless the witnesses for the crown cannot be produced at that time; and if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the judges of assizes. 7. That any such prisoner may move for and obtain his *habeas corpus*, as well out of the Chancery or Exchequer, as out of the King's Bench or Common Pleas; and the lord chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, shall forfeit severally to the party grieved the sum of £500. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported, or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions; on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party grieved a sum not less than £500; shall be disabled to bear any office of trust or profit; shall incur the penalties of *præmunire*; and shall be incapable of the king's pardon.

This is the substance of that great and important statute: which extends (we may observe) only to the case of commitments for such criminal charges as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to antient precedents (a) and the spirit

[of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*; otherwise an attachment will issue.] And by 56 Geo. III. c. 100, it is now provided—1. That where any person shall be restrained of his liberty other than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit, any of the barons of the exchequer of the degree of the *coif*, or any of the justices of either bench, shall upon *affidavit* showing a probable and reasonable ground for such complaint, award in vacation time a writ of habeas corpus, under the seal of the court whereof he is a judge, directed to the person in whose custody the party is confined, which shall be returnable immediately before himself, or any other judge of the court. 2. That upon disobedience to the writ, the judge before whom it is returnable may issue a warrant to arrest the party guilty of such contempt. 3. That if the writ should be awarded so late in vacation that it cannot be conveniently obeyed during vacation, the same may be made returnable in the court to which the judge by whom it is awarded belongs, on a certain day in the next term. 4. That if such writ shall be awarded by the Court itself of Queen's Bench, Common Pleas, or Exchequer, so late that it cannot be conveniently obeyed during the term, the same may be made returnable in the then next vacation before any of the judges. 5. That though the return to the writ may be good in law, it shall be lawful for the judge before whom it is returnable to proceed to examine into the truth of the facts—and if it appears doubtful to him whether they be true or not, it shall be lawful for such judge to let to bail the person so confined, upon his entering into a recognizance to appear in the court to which the judge belongs in the term following, which court may proceed to examine into the truth of the facts in a summary way by *affidavit*, and to order and determine as to the discharge, bailing, or remanding of the party. 6. That the like proceeding for controverting the truth of the return may be had in the case where the writ

shall be awarded by the court itself, or be returnable therein. 7. That the several provisions aforesaid shall extend to all writs of habeas corpus awarded in pursuance of the act of 31 Car. II. Lastly, that the habeas corpus according to this act of 56 Geo. III. c. 100, may run into any county palatine or cinque port, or other privileged place, or the Islands of Jersey, Guernsey, and Man, or any port, harbour, road, creek or bay upon the coast of England or Wales lying out of the body of any county.

[By which admirable regulations the remedy is now complete for removing the injury of unjust and illegal confinement. A remedy the more necessary because the oppression does not always arise from the ill nature but sometimes from the mere inattention of government. For it frequently happens in foreign countries (and has happened in England during the temporary suspension of the statute) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.]

VI. The writ of *Certiorari*.

This issues out of the Court of Chancery, or a superior court of the common law, directed in the king's (or queen's) name to the judges or officers of inferior courts of record (c), commanding them to return the record of a cause depending before them, to the end the party may have the more sure and speedy justice (d). This writ may be had either in criminal or civil cases. For in the former the Queen's Bench has a superintendence over all inferior courts, and may remove the indictments or other proceedings therein depending, and transfer them to its own jurisdiction. But the consideration of this use of the writ belongs more properly to the next volume of these Commentaries: and our attention is at present called to its application in civil cases only. Its object here is similar in general to that of the *habeas corpus cum*

(c) Bac. Abr. *Certiorari* A.

(d) As to courts not of record, see *Ex parte Phillips*, 2 Ad. & El. 586.

causâ (*e*)—that is, to obtain relief from some inconvenience supposed in the particular case to arise from a cause being allowed to proceed to trial before an inferior jurisdiction less capable than the superior court of rendering complete and effectual justice (*f*).

There is, however, this distinction between the two modes of remedy, that by the latter writ the person of the defendant (when he is in custody) as well as the proceedings in the cause are capable of being removed from the court below—while the writ of *certiorari* affects the proceedings only (*g*). So that where an arrest of the defendant has taken place in the inferior court, it is usual to resort to a *habeas corpus* rather than a *certiorari*. The provisions before cited from the acts 1 & 2 P. & M. c. 13; 21 Jac. I. c. 23; 19 Geo. III. c. 70; 7 & 8 Geo. IV. c. 71, with respect to the writ of *habeas corpus cum causâ*, apply equally to the writ now in question.

In addition to these remedies by prerogative writs, we may notice a species of relief (wholly unconnected with the prerogative) afforded under particular circumstances by the provisions of a modern act of parliament, and conclude the chapter with—

VII. *The motion by way of interpleader*, or, as it may be otherwise called, motion for relief from adverse claims. It often happens that a man finds himself exposed to the adverse claims of two opposite parties, each requiring him to pay a certain sum of money, or to deliver certain goods, and that he is unable to comply safely with the requisition of either, because a reasonable doubt exists to which of them the property in truth belongs. Until a recent period

(*e*) Vide sup. p. 693.

(*f*) As to the removal of judgment by *certiorari* into the superior courts for the purpose of obtaining execution therein, see 19 Geo. 3, c. 70, and 1 & 2 Viet. c. 110, s. 22, referred to sup. p. 405, n. (*o*). It is a general rule

that a *certiorari* will not lie to remove a cause from an inferior court after judgment. *Walker v. Gann*, 7 D. & R. 769.

(*g*) See *Doe d. Sadler v. Dring*, 1 B. & C. 253.

a person so circumstanced had no means of relief except in a court of equity, by a proceeding there called a bill of interpleader, which was attended with considerable expense and delay. But by 1 & 2 Will. IV. c. 58 (*h*), it is now provided, that, upon application made on behalf of any defendant sued in any of the superior courts at Westminster, or in the court of common pleas of the county palatine of Lancaster, or the court of pleas of the county palatine of Durham, in any action of assumpsit, debt, detinue, or trover, (such application being made after declaration and before plea by affidavit or otherwise,) showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued, or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court or any judge thereof may direct—it shall be lawful for the court or judge to make rules and orders calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish the same, and if he maintains it to make himself defendant in the same action or otherwise; or, with the consent of the plaintiff and such third party, may dispose of the question between them in a summary manner.

By the same statute a similar protection is afforded to sheriffs, and other officers, who under the process of the court are called upon to seize the goods of any person, and are afterwards sued, or find themselves in danger of being sued, by some third party claiming property in the same goods (*i*).

(*h*) And see 1 & 2 Vict. c. 45, s. 2; *Teggin v. Langford*, 10 Mee. & W. 557; *Johnson v. Shaw*, 4 Man. & G. 916.

(*i*) See the following cases under the Interpleader Act, *Applegarth v.*

Colley, 2 Dowl. N. S. 223; *Frost v. Heywood*, *ibid.* 801; *Levi v. Coyle*, *ibid.* 932; *Patorni v. Campbell*, 1 Dowl. & L. 397; *Candy and Dean v. Maugham*, *ibid.* 745; *Shortridge v. Young*, 12 Mee. & W. 5.

CHAPTER XIII.

OF CIVIL INJURIES COGNIZABLE IN THE ECCLESIASTICAL, MILITARY AND MARITIME COURTS—
WITH THEIR REMEDIES.

HAVING now examined in detail the civil injuries cognizable at common law, with their several remedies, our attention must next be turned to such wrongs and remedies as appertain to the courts ecclesiastical, military and maritime.

With regard to these our course will be not so much to [consider what hath at any time been claimed or pretended to belong to their jurisdiction, by the officers and judges of those respective courts ; but what the common law allows and considers to be of that character.

For these eccentric tribunals (which are principally guided by the rules of the imperial and canon laws) as they subsist, and are admitted in England, not by any right of their own (*a*), but upon bare sufferance and toleration from the municipal laws, must have recourse to the laws of that country wherein they are thus adopted, to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them. It matters not, therefore, what the pandects of Justinian, or the decretals of Gregory have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus ; curious, perhaps, for their antiquity, respectable for their equity, and frequently of admirable use in illustrating a

(*a*) Vide sup. vol. i. p. 8.

[point of history. Nor is it at all material in what light other nations may consider this matter of jurisdiction. Every nation must and will abide by its own municipal laws; which various accidents conspire to render different in almost every country in Europe. We permit some kinds of suits to be of ecclesiastical cognizance, which other nations have referred entirely to the temporal courts; as concerning wills and successions to intestates' chattels: and perhaps we may, in our turn, prohibit them from interfering in some controversies, which on the continent may be looked upon as merely spiritual. In short, the common law of England is the one uniform rule to determine the jurisdiction of our courts: and, if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them (*b*); and in some cases punish their judges (*c*).

Having premised this general caution, we proceed now to consider,

I. The wrongs or injuries cognizable by the ecclesiastical courts.] By which is to be understood [such as are offered to private persons or individuals; which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring*, (*pro salute animæ*, as is the case with immoralities in general, when unconnected with private injuries,) but for the sake of the party *injured*, to make him a satisfaction and redress for the damage which he has sustained. And these will be reduced under three general heads; of causes *pecuniary*, causes *matrimonial*, and causes *testamentary* (*d*).

(*b*) Vide sup. p. 685, and as to the prohibition to the ecclesiastical courts, see *Ex parte Tucker*, in *re Inman*, 1 M. & G. 519; *Tucker v. Inman*, 4 Man. & G. 1049.

(*c*) Hal. Hist. C. L. c. 2.

(*d*) Besides these subjects of jurisdiction the spiritual courts occasionally entertain suits in case of defamation,

where words are uttered imputing incontinency, or any offence merely spiritual. The person found guilty of such offence used to be directed to do penance in the church. In practice, however, of late years, the Courts of Arches and Consistory have very rarely required the performance of penance. Causes of defamation are now of unfrequent

[1. Pecuniary causes, cognizable in the ecclesiastical courts, are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church, whereby some damage accrues to the plaintiff; towards obtaining a satisfaction for which he is permitted to institute a suit in the spiritual court.

One of these is the subtraction or withholding of *tithes*(*d*) from the parson or vicar, whether the former be a clergyman or a lay proprietor(*e*). But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the *right* of tithes unless between spiritual persons(*f*); but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed(*g*). By the statute or rather writ(*h*) of *circumspecte agatis*(*i*), it is declared that the court christian shall not be prohibited from holding plea, “*si rector petat versus parochianos oblationes et decimas debitas et consuetas*:” so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, but before the king’s courts of the common law; as such question affects the temporal inheritance, and the determination must bind the real property. But where the *right* does not come into question, but only the *fact* whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury, for which the remedy may properly be had in the spiritual court; *viz.* the recovery of the tithes, or their equivalent. By statute 2 & 3 Edw. VI. c. 13, it is enacted, that if any person shall carry off his predial tithes (*viz.* of corn, hay, or the

occurrence in the Court of Arches and Consistory of London, but they still prevail to a considerable extent in many of the jurisdictions in the country. Report of Commissioners of Ecclesiastical Courts, p. 63, Feb. 1832.

(*d*) Vide sup. p. 123.

(*e*) Stat. 32 Hen. 8, c. 7.

(*f*) 2 Roll. Abr. 309, 310; Bro. Abr. t. Jurisdiction, 85.

(*g*) 2 Inst. 364, 489, 490.

(*h*) See Barrington, 120; 3 Pryn. Rec. 336.

(*i*) 13 Edw. 1, st. 4, or rather 9 Edw. 2.

[like,) before the tenth part is duly set forth, or agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes or his deputy from viewing or carrying them away; such offender shall pay *double* the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws. By a former clause of the same statute, the *treble* value of the tithes, so subtracted or withheld, may be sued for in the temporal courts, which is equivalent to the *double* value to be sued for in the ecclesiastical. For one may sue for and recover in the ecclesiastical courts the tithes themselves, or a recompense for them, by the antient law; to which the suit for the *double* value is superadded by the statute. But as no suit lay in the temporal courts for the subtraction of tithes themselves, therefore the statute gave a *treble* forfeiture, if sued for there; in order to make the course of justice uniform, by giving the same reparation in one court as in the other (*k*). However, it now seldom happens that tithes are sued for at all in the spiritual court (*l*); for if the defendant pleads any custom, *modus*, composition, or other matter whereby the right of tithing is called in question, this takes it out of the jurisdiction of the ecclesiastical judges; for the law will not suffer the existence of such a right to be decided by the sentence of any single, much less an ecclesiastical, judge, without the verdict of a jury.] A summary method, besides, of recovering tithes not exceeding the value of £10, (or, where due from Quakers, £50,) is given by statute 53 Geo. III. c. 127, (amending some former statutes on the same subject,) by complaint to two justices of the peace; and by 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, no other

(*k*) 2 Inst. 250.

(*l*) The claim itself to tithes, it will be recollected, has now become comparatively rare—that species of property having been in the great ma-

jority of parishes already commuted into corn rent charge by the provisions of the Tithe Commutation Act, as to which vide *supra*, p. 133.

remedy is now allowed in such cases, unless the title to the tithes be *bonâ fide* brought into question.

[Another pecuniary injury, cognizable in the spiritual courts, is the *non-payment* of other ecclesiastical *dues* to the clergy; as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of surplice fees (*l*), for marriages or other ministerial offices of the church: all which injuries are redressed by a decree for their actual payment.] But by the several statutes just mentioned, the same provisions that are made with respect to tithes of small amount, and those claimed from Quakers, are extended to oblations also.

[Moreover, for *fees* settled and acknowledged to be due to the officers of the ecclesiastical courts, a suit will lie therein: but not if the *right* of the fees is at all disputable; for then it must be decided by the common law (*m*).] [And under this head of pecuniary injuries may also be reduced the several matters of spoliation, dilapidations, and neglect of repairing the church and things thereunto belonging; for which a satisfaction may be sued for in the ecclesiastical court.

Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right thereunto, but under a pretended title. It is remedied by a decree to account for the profits so taken. This injury, when the *jus patronatus* or right of advowson doth not come in debate, is cognizable in the spiritual court: as if a patron first presents A. to a benefice, who is instituted and inducted thereto; and then, upon pretence of a vacancy, *the same* patron presents B. to the same living, and he also obtains institution and induction. Now, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, or taking the profits of his benefice. And it shall there be tried, whether the living were, or were not, vacant; upon which the validity of the second clerk's pretensions must

(*l*) Vide sup. 146.

(*m*) 1 Ventr. 165.

[depend (*n*). But if the right of patronage comes at all into dispute, as if one patron presented A. and another patron presented B., there the ecclesiastical court hath no cognizance, provided the tithes sued for amount to a fourth part of the value of the living, but may be prohibited, at the instance of the patron, by the king's writ of *indicavit* (*o*). So, also, if a clerk, without any colour of title, ejects another from his parsonage, this injury must be redressed in the temporal courts; for it depends upon no question determinable by the spiritual law, (as plurality of benefices or no plurality, vacancy or no vacancy,) but is merely a civil injury.

For *dilapidations*, which are a kind of ecclesiastical waste, either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay; an action also lies, either in the spiritual court by the canon law, or in the courts of common law (*p*), and it may be brought by the successor against the predecessor, if living, or if dead, then against his executors (*q*).] Also, by statute 13 Eliz. c. 10, if any spiritual person makes over or alienates his goods, with intent to defeat his successors of their remedy for dilapidations, the successor shall have such remedy against the alienee, in the ecclesiastical court, as if he were the executor of his predecessor.]

[As to the neglect of reparations of the church, churchyard, and the like, the spiritual court has undoubted cognizance thereof (*r*); and a suit may be brought therein for non-payment of a rate (*s*) made by the churchwardens for that purpose. [But by 53 Geo. III. c. 27, 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, if the rate does not exceed £10, or, in the case of Quakers, £50, and its validity is not disputed, the remedy is to be before two justices of the

(*n*) F. N. B. 36.

3 Lev. 268.

(*o*) *Circumspecte agatis*, 13 Ed. 1, st. 4; *Artic. Cleri*, 9 Edw. 2, c. 2; F. N. B. 45.

(*q*) *Vide sup.* p. 507.

(*r*) *Circumspecte agatis*; 5 Rep. 66.

(*p*) *Jones v. Hill*, Cart. 224; S. C.

(*s*) *Vide sup.* p. 91.

peace, and the ecclesiastical court can exercise no jurisdiction(*t*). [And these are the principal pecuniary injuries which are cognizable, or for which suits may be instituted, in ecclesiastical courts.

2. Matrimonial causes, or injuries respecting the rights of marriage, are another, and a much more undisturbed, branch of the ecclesiastical jurisdiction. Though, if we consider marriages in the light of mere civil contracts, they do not seem to be properly of spiritual cognizance(*u*). But the Romanists having very early converted this contract into a holy sacramental ordinance, the church of course took it under her protection, upon the division of the two jurisdictions. And, in the hands of such able politicians, it soon became an engine of great importance to the papal scheme of an universal monarchy over Christendom. The numberless canonical impediments that were invented, and occasionally dispensed with, by the holy see, not only enriched the coffers of the church, but gave it a vast ascendant over princes of all denominations; whose marriages were sanctified or reprobated, their issue legitimated or bastardized, and the succession to their thrones established or rendered precarious, according to the humour or interest of the reigning pontiff: besides a thousand nice and difficult scruples, with which the clergy of those ages puzzled the understandings and loaded the consciences of the inferior orders of the laity; and which could only be unravelled and removed by these their spiritual guides. Yet, abstracted from this universal influence, which affords so good a reason for their conduct, one might otherwise be led to wonder, that the same authority, which enjoined the strictest celibacy to the priesthood, should think them the proper judges in causes between man and wife. These causes indeed, partly from the nature of the injuries complained of, and partly from

(*t*) See *R. v. St. Clement's*, 12 A. ib. 210; *Burder v. Velcy*, ib. 233.
& *E.* 177; *R. v. Thorogood*, ib. 183; (u) *Warb. Alliance*, 173.
Jolly v. Baines, ib. 201; *R. v. Baines*,

[the clerical method of treating them (*v*), soon became too gross for the modesty of a lay tribunal. And causes matrimonial are now so peculiarly ecclesiastical, that the temporal courts will never interfere in controversies of this kind, unless in some particular cases. As, if the spiritual court do proceed to call a marriage in question] upon grounds that render it merely voidable (*x*), [after the death of either of the parties; this the courts of common law will prohibit, because it tends to bastardize and disinherit the issue; who cannot so well defend the marriage as the parties themselves, when both of them living, might have done (*y*).

Of matrimonial causes, one of the first and principal is, 1. *Causa jactitationis matrimonii*; when one of the parties boasts (*z*) or gives out that he or she is married to the other, whereby a common reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head; which is the only remedy the ecclesiastical courts can give for this injury. 2. Another species of matrimonial causes was, when a party contracted to another brought a suit in the ecclesiastical court to compel a celebration of the marriage, in pursuance of such contract; but this branch of causes is now cut off entirely by the] Marriage Act, 4 Geo. IV. c. 76, s. 27, re-enacting a former provision of 26 Geo. II. c. 33, [which enacts, that for the future no suit shall be had in any ecclesiastical court, to compel a celebration of marriage *in facie ecclesiæ*, for or because of any *contract* of matrimony whatsoever. 3. The suit for *restitution of conjugal rights* is also another

(*v*) Some of the impurest books that are extant in any language, are those written by the popish clergy on the subjects of matrimony and divorce.

(*x*) Vide sup. vol. ii. p. 280.

(*y*) 2 Inst. 614.

(*z*) See Lord Hawke v. Corri, 2 Dr. Hagg. 220.

[species of matrimonial causes; which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again, if either party be weak enough to desire it contrary to the inclination of the other. 4. *Divorces* also, of which and their several distinctions we treated at large in a former volume (a), are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge. If it becomes improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer, for this the ecclesiastical law administers the remedy of separation, or a divorce *a mensa et thoro*. But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, in this case the law decrees not only a separation from bed and board, but a *vinculo matrimonii* itself. 5. The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that *a mensa et thoro*; which is the suit for *alimony*,] the nature of which has been already (b) explained in treating of the subject of marriage.

3. Testamentary causes are the only remaining species belonging to the ecclesiastical jurisdiction; which, as they are certainly of a mere temporal nature (c), may seem at first view a little oddly ranked among matters of a spiritual cognizance. And indeed (as was in some degree observed in a former volume (d)) they were originally cognizable in the king's courts of common law, viz. the county courts (e); and afterwards transferred to the jurisdiction of the church by the favour of the crown, as a natural consequence of granting to the bishops the administration of intestates' effects.

This spiritual jurisdiction of testamentary causes is a

(a) Vide sup. vol. ii. p. 310.

(b) Ibid. 312.

(c) Warburt. Alliance, 173.

(d) Vide supra, vol. ii. p. 230.

(e) Hickes' Disser. Epistolar. pp.

8, 58.

[peculiar constitution of this island; for in almost all other (even in popish) countries, all matters testamentary are under the jurisdiction of the civil magistrate. And that this privilege is enjoyed by the clergy in England, not as a matter of ecclesiastical right, but by the special favour and indulgence of the municipal law, and, as it should seem, by some public act of the great council, is freely acknowledged by Lindewode, the ablest canonist of the fifteenth century. Testamentary causes, he observes, belong to the ecclesiastical courts "*de consuetudine Angliæ, et super consensu regis et suorum procerum in talibus ab antiquo concessio* (f)." The same was, about a century before, very openly professed in a canon of Archbishop Stratford, viz. that the administration of intestates' goods was "*ab olim*" granted to the ordinary, "*consensu regis et magnatum regni Angliæ*" (g). The Constitutions of Cardinal Othobon also testify, that this provision "*olim a prælatis cum approbatione regis et baronum dicitur emanasse*" (h). And Archbishop Parker (i), in Queen Elizabeth's time, affirms in express words, that originally in matters testamentary, "*non ullam habebant episcopi auctoritatem, præter eam quam a rege acceptam referebant. Jus testamenta probandi non habebant, administrationis potestatem cuique delegare non poterant.*"

At what period of time the ecclesiastical jurisdiction of testaments and intestacies began in England, is not ascertained by any antient writer; and Lindewode (j) very fairly confesses "*cujus regis temporibus hoc ordinatum sit, non reperio.*" We find it indeed frequently asserted in our common law books, that it is but of *late years* that the church hath had the probate of wills (k). But this must only be understood to mean, that it hath not *always* had this prerogative; for certainly it is of very high antiquity,

(f) Provincial. l. 3, t. 13, fol. 176.

(j) Fol. 263.

(g) Provincial. l. 3, t. 38, fol. 263.

(k) Fitz. Abr. tit. Testament, pl. 4;

(h) Cap. 23.

2 Roll. Abr. 217; 9 Rep. 37; Vaugh.

(i) See 9 Rep. 38.

207.

[Lindewode, we have seen, declares that it was "*ab antiquo*;" Stratford, in the reign of King Edward III. mentions it as "*ab olim ordinatum*;" and Cardinal Othobon, in the 52 Hen. III. speaks of it as an antient tradition. Bracton holds it for clear law in the same reign of Henry III. that matters testamentary belonged to the spiritual court (*l*). And, yet earlier, the disposition of intestates' goods "*per visum ecclesiæ*" was one of the articles confirmed to the prelates by King John's *Magna Charta* (*m*). Matthew Paris also informs us, that King Richard I. ordained in Normandy, "*quod distributio rerum quæ in testamento relinquuntur auctoritate ecclesiæ fiet*." And even this ordinance of King Richard was only an introduction of the same law into his ducal dominions, which before prevailed in this kingdom: for in the reign of his father Henry II. Glanvil is express, that "*si quis aliquid dixerit contra testamentum, placitum illud in curia christianitatis audiri debet et terminari*" (*n*). And the Scots book called *Regiam Majestatem* agrees *verbatim* with Glanvil in this point (*o*).

It appears that the foreign clergy were pretty early ambitious of this branch of power: but their attempts to assume it on the continent were effectually curbed by the edict of the emperor Justin (*p*), which restrained the insinuation or probate of testaments (as formerly) to the office of the *magister census*: for which the emperor subjoins this reason: "*absurdum etenim clericis est, immo etiam opprobriosum, si peritos se velint ostendere discepcionum esse forensium*." But afterwards by the canon law (*q*) it was allowed, that the bishop might compel by ecclesiastical censures the performance of a bequest to *pious uses*. And therefore, as that was considered as a cause "*quæ secundum canones et episcopales leges ad regimen animarum pertinuit*,"

(*l*) L. 5; De Exceptionibus, c. 10.

(*m*) Cap. 27, edit. Oxon.

(*n*) L. 7, c. 8.

(*o*) L. 2, c. 38.

(*p*) Cod, 1, 3, 41.

(*q*) Decretal. 3, 26, 17; Gilb. Rep. 204, 205.

[it fell within the jurisdiction of the spiritual courts by the express words of the charter of King William I. which separated those courts from the temporal. And afterwards when King Henry I., by his coronation charter, directed that the goods of an intestate should be divided for the good of his soul (*r*), this made all intestacies immediately spiritual causes, as much as a legacy to pious uses had been before. This, therefore, we may probably conjecture, was the era referred to by Stratford and Othobon, when the king by the advice of the prelates, and with the consent of his barons, invested the church with this privilege. And accordingly in King Stephen's charter it is provided, that the goods of an intestate ecclesiastic shall be distributed *pro salute animæ ejus, ecclesiæ consilio* (*s*); which latter words are equivalent to *per visum ecclesiæ* in the great charter of King John before mentioned. And the Danes and Swedes (who received the rudiments of Christianity and ecclesiastical discipline from England about the beginning of the twelfth century) have thence also adopted the spiritual cognizance of intestacies, testaments, and legacies (*t*).

This jurisdiction, we have seen, is principally exercised with us in the consistory courts of every diocesan bishop, and in the prerogative court of the metropolitan originally; and in the arches court and] in the privy council, which has lately superseded the former jurisdiction of the delegates, [by way of appeal. It is divisible into three branches; the probate of wills (*u*), the granting of administrations, and the suing for legacies. The two former of which, when no opposition is made, are granted merely

(*r*) "*Si quis baronum seu hominum meorum—pecuniam suam non dederit vel dare disposuerit, uxor sua, sive liberi, aut parentes et legitimi homines ejus, eam pro anima ejus dividant, sicut eis melius visum fuerit.*" (Text. Roffens. c. 34, p. 51.)

(*s*) Lord Lyttel. Hen. 2, vol. i. 536; Hearue, ad Gul. Neubr. 711.

(*t*) Stiernhook, De Jure Sueon. 1. 3, c. 8.

(*u*) Vide supra, vol. ii. p. 226, et seq. As to the jurisdiction of the Ecclesiastical Courts to grant a probate of a testamentary paper made by a *feme covert* under a power, see Ex parte Tucker, in re Inman, 1 Man. & G. 519; Tucker v. Inman, 4 Man. & G. 1049.

[*ex officio et debito justitiæ*, and are then the object of what is called the *voluntary*, and not the *contentious* jurisdiction. But when a *caveat* is entered against proving the will, or granting administration, and a suit thereupon follows to determine either the validity of the testament, or who hath a right to administer; this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration. Subtraction, the withholding or detaining of legacies, is also still more apparently injurious by depriving the legatees of that right, with which the laws of the land and the will of the deceased have invested them: and therefore as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein, by compelling the executor to pay them. But in this last case the courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts (*x*), as incident to some other species of relief prayed by the complainant; as to compel the executor to account for the testator's effects, or assent to the legacy, or the like (*y*). For, as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives there also its full determination.

These are the principal injuries for which the party grieved either must or may seek his remedy in the spiritual courts. But before we entirely dismiss this head, it may not be improper to add a short account of the *method of proceeding* in these tribunals, with regard to the redress of injuries.]

[The establishment of the civil law process in all the ecclesiastical courts was a masterpiece of papal discernment, as it made a coalition impracticable between them

(*x*) As to the jurisdiction of the courts of equity on this subject, see *Hill v. Turner*, 1 Atk. 516; *Hurst v. Beech*, 5 Mad. 351.

spiritual courts to recover tithes, legacies, or other property, where there is also a remedy at law, see 3 & 4 Will. 4, c. 27, s. 43.

(*y*) As to the limitation of suits in

[and the national tribunals, without manifest inconvenience and hazard : and this consideration had undoubtedly its weight in causing this measure to be adopted, though many other causes concurred. The time when the Pandects of Justinian were discovered afresh and rescued from the dust of antiquity, the eagerness with which they were studied by the popish ecclesiastics, and the consequent dissensions between the clergy and the laity of England, have formerly been spoken to at large (z). We shall only now remark upon those collections, that their being written in the Latin tongue, and referring so much to the will of the prince and his delegated officers of justice, sufficiently recommended them to the court of Rome, exclusive of their extrinsic merit. To keep the laity in the darkest ignorance, and to monopolize the little science which then existed entirely among the monkish clergy, were deep-rooted principles of papal policy. And as the bishops of Rome affected in all points to mimic the imperial grandeur, as the spiritual prerogatives were moulded on the pattern of the temporal, so the canon law process was formed on the model of the civil law : the prelates embracing with the utmost ardour a method of judicial proceedings, which was carried on in a language unknown to the bulk of the people, which banished the intervention of a jury (that bulwark of Gothic liberty), and which placed an arbitrary power of decision in the breast of a single man.

The proceedings in the ecclesiastical courts are therefore regulated according to the practice of the civil and canon laws, or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the courts of common law (a). For if the proceedings in the spiritual court be ever so regularly consonant to the rules of the Roman law, yet if they be manifestly repugnant to the fundamental maxims of the municipal laws, to which upon principles

(z) Vide sup. vol. i. p. 11.

(a) And see 10 Geo. 4, c. 53.

[Of sound policy the ecclesiastical process ought in every state to conform (*b*), (as if they require two witnesses to prove a fact, where one will suffice at common law,) in such cases a prohibition will be awarded against them (*c*). But under these restrictions, their ordinary course of proceeding (*d*) is, first, by *citation*, to call the party injuring before them. Then by *libel* (*libellus*, a little book), or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint. To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* by witnesses examined and their depositions taken down in writing, by an officer of the court. If the defendant has any circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist. The canonical doctrine of *purgation*, whereby the parties were obliged to answer upon oath to any matter, however criminal, that might be objected against them (though long ago overruled in the Court of Chancery, the genius of the English law having broken through the bondage imposed on it by its clerical chancellors, and asserted the doctrines of judicial as well as civil liberty), continued till the middle of the 17th century to be upheld by the spiritual courts, when the legislature was obliged to interpose, to teach them a lesson of similar moderation. By the statute of 13 Car. II. c. 12, it is enacted, that it shall not be lawful for any bishop or ecclesiastical judge to tender or administer to any person whatsoever, the oath usually called the oath *ex officio*, or any other oath whereby he may be compelled to confess, accuse or purge himself of any criminal matter or thing, whereby he may be liable to any censure or punishment. When all the pleadings and proofs are concluded, they

(*b*) Warb. Alliance, 179.

(*c*) 2 Roll. Abr. 300, 302. Et vide sup. p. 685.

(*d*) On this subject, see Report of Commissioners of Ecclesiastical Courts (Feb. 1832), p. 14.

[are referred to the consideration, not of a jury, but of a single judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal* in the several stages mentioned in a former chapter (e).]

The ecclesiastical courts have power to pronounce, among other sentences, that of excommunication, such sentences being pronounced as a spiritual censure for offences falling under ecclesiastical cognizance, and [this is described to be twofold, the less and the greater. The less excommunication is an ecclesiastical censure, excluding the party from the participation of the sacraments; the greater proceeds farther, and excludes him not only from these, but also from the company of all Christians.] Formerly, too, [an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo*. He could not serve upon juries, could not be a witness in any court, and, what was worst of all, could not bring an action, either real or personal, to recover lands or money due to him.] But now, by 53 Geo. III. c. 127, s. 3, no person who shall be pronounced excommunicate shall incur thereby any civil penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the court so excommunicating such person shall pronounce; which imprisonment shall be enforced in such manner as the act provides, by a writ *de excommunicato capiendo*.

By the former practice of these courts, it was only by means of an excommunication that they were able to enforce their sentences in any case whatever; so here, the common law stepped in to their assistance; for in case of the refusal of the party to submit to his sentence, and being thereupon excommunicated as for a contempt,

(e) Vide sup. pp. 431, 432. See 6 & 7 Vict. c. 38, s. 15, giving the Judicial Committee of the Privy Council power

to regulate the practice and mode of proceeding in all appeals from ecclesiastical courts.

a writ *de excommunicato capiendo* was issued, under which he was to be taken and committed to the county goal till he was reconciled to the church, and such reconciliation certified by the bishop. But now by the same statute, 53 Geo. III. c. 127, s. 2, excommunication in all cases of contempt is discontinued, and in lieu thereof, where a lawful citation or sentence has not been obeyed, the judge shall have power, after a certain period, to pronounce such person contumacious and in contempt, and to signify the same to the Court of Chancery: whereupon a writ *de contumace capiendo* (*f*) shall issue from that court, which shall have the same force and effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo* (*g*.)

II. We are [next to consider the injuries cognizable in the *court military* or court of *chivalry*. The jurisdiction of which is declared by statute 13 Ric. II. c. 2, to be this: "That it hath cognizance of contracts touching deeds of arms or of war out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law; together with other usages and customs to the same matters appertaining." So that wherever the common law can give redress, this court hath no jurisdiction; which has thrown it entirely out of use as to the matter of contracts, all such being usually cognizable in the courts of Westminster Hall.

The words, "other usages and customs," support the claim of this court, 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour; and 2. To keep up the distinction of degrees and

(*f*) R. v. Ricketts, 6 A. & E. 537; R. v. Baines, 12 Ad. & E. 210.

(*g*) See 2 & 3 Will. 4, c. 93, giving the ecclesiastical courts of England and Ireland power to enforce obedience to their protests and decrees out

of the limits of their respective jurisdictions; and 3 & 4 Vict. c. 93, authorizing the Judicial Committee of the Privy Council to discharge persons in custody under writs *de contumace capiendo*.

[quality. Whence it follows, that the civil jurisdiction of this court of chivalry is principally in two points: the redressing injuries of honour, and correcting encroachments in matters of coat-armour, precedence, and other distinctions of families.

As a court of honour, it is to give satisfaction to all such as are aggrieved in that point; a point of a nature so nice and delicate, that its wrongs and injuries escape the notice of the common law, and yet are fit to be redressed somewhere. Such, for instance, as calling a man coward, or giving him the lie; for which, as they are productive of no immediate damage to his person or property, no action will lie in the courts at Westminster: and] amends was by the common law appointed to be given in the court of chivalry (*h*). Modern resolutions however have determined, that how much soever such a jurisdiction may be expedient, yet no action for words will at present lie therein (*i*). And it hath always been most clearly holden (*k*), that as this court cannot meddle with any thing determinable by the common law, it therefore can give no pecuniary satisfaction or damages; inasmuch as the quantity and determination thereof is ever of common law cognizance. And therefore this court of chivalry can at most only order reparation in point of honour; as, to compel the defendant *mendacium sibi ipsi imponere*, or to take the lie that he has given upon himself, or to make such other submission as the laws of honour may require (*l*). Neither can this court, as to the point of reparation in honour, hold plea of any such word, or thing, wherein the party is relievable by the courts of common law. As if a man gives another a blow, or calls him thief or murderer; for in both these cases the common law has pointed out his proper remedy by action.

(*h*) Year Book, 37 Hen. 6, 21; Salk. 533; S. C. 7 Mod. 126; 2 Selden, of Duels, c. 10; Hal. Hist. Hawk. P. C. 4.
C. L. 37.

(*k*) Hal. Hist. C. L. 37.

(*i*) Chambers v. Sir J. Jennings, (*l*) 1 Roll. Abr. 128.

[As to the other point of its civil jurisdiction, the redressing of incroachments and usurpations in matters of heraldry and coat-armour: it is the business of this court, according to Sir Matthew Hale, to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c. and also rights of place or precedence, where the king's patent or act of parliament (which cannot be overruled by this court) have not already determined it.

The proceedings in this court are by petition, in a summary way; and the trial not by a jury of twelve men, but by witnesses, or by combat (*m*). But as it cannot imprison, not being a court of record, and as by the resolutions of the superior courts it is now confined to so narrow and restrained a jurisdiction, it has fallen into contempt and disuse. The marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, is now greatly disregarded; and has fallen into the hands of certain officers and attendants upon this court, called heralds,] whose testimony as to descent is no longer of the same weight as formerly, nor even in general admissible in a court of justice. [But their original visitation books, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them upon oath, are allowed to be good evidence of pedigrees (*n*).

III. Injuries cognizable by the courts maritime, or admiralty courts, are the next object of our inquiries. These courts have jurisdiction and power to try and

(*m*) By 59 Geo. 3, c. 46, the trial by combat, or wager of battle, in a writ of right, was abolished.

(*n*) Comb. 63. Blackstone expresses an opinion that it would be desirable that this practice of visitation at certain periods were revived: for, as he remarks, the failure of in-

quisitions *post mortem*, by the abolition of military tenures, combined with the negligence of the heralds in omitting their usual progresses, has rendered the proof of a modern descent, for the recovery of an estate or succession to a title of honour, more difficult than that of an antient.

[determine all maritime causes; or such injuries which, though they are in their nature of common law cognizance, yet being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any county (*o*). For the statute 13 Ric. II. c. 5, directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea; and the statute 15 Ric. II. c. 3, declares that the court of the admiral hath no manner of cognizance of any contract, or of any other thing done within the body of any county (*p*), either by land or by water; nor of any wreck of the sea: for that must be cast on land before it becomes a wreck (*q*). But it is otherwise of things *flotsam*, *jetsam*, and *ligan*; for over them the admiral hath jurisdiction, as they are in and upon the sea (*r*). If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law excludes the Admiralty Court from its jurisdiction: for, part belonging properly to one cognizance, and part to another, the common or general law takes place of the particular (*s*). Therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as seamen's wages (*t*), are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land (*u*); yet, in general, if there be a contract made in England and to be executed upon the seas, as a charter-party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on ship-

(*o*) Co. Litt. 260; *Palmer v. Pope*, Hob. 104.

(*p*) As to what is *infra corpus committatus*, see Com. Dig. Admiralty (E. 14); Jac. Law Dic. "Admiral."

(*q*) See as to wreck, &c. vol. ii. p. 555.

(*r*) 5 Rep. 106.

(*s*) Co. Litt. 261.

(*t*) As to jurisdiction in case of seamen's wages, see *Howe v. Napier*, 4 Burr. 1944.

(*u*) 1 Vent. 146.

[board to pay money in London, or the like : these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law (x).] It is to be observed however that [where the Admiralty Court hath jurisdiction of the original subject-matter in the cause, it hath also jurisdiction of all consequential questions, though properly determinable at common law (y).] Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea may be brought in the Court of Admiralty, the admiral having an original jurisdiction over beacons (z).

The jurisdiction over prizes in time of war between our own nation and another, or between two other nations, which are taken at sea and brought into our ports, though not properly incident to the admiralty, is nevertheless exercised by the judge of that court, to whom the crown ordinarily commits the cognizance of prize causes, to determine the same according to the law of nations (a).

[The proceedings of the Courts of Admiralty bear much resemblance to those of the civil law, but are not entirely founded thereon : and they likewise adopt and make use of other laws, as occasion requires ; such as the Rhodian laws, and the laws of Oleron (b). For the law of England, as has frequently been observed, doth not acknowledge or pay any deference to the civil law, considered as such ; but merely permits its use in such cases where it judged its determinations equitable, and therefore blends it, in the present instance, with other marine laws ; the whole being corrected, altered and amended by acts of parliament and common usage ; so that out of this composition a body of jurisprudence is extracted, which owes its authority only to its reception here by consent of the

(x) *Bridgeman's case*, Hob. 23 ;
Hal. Hist. C. L. 35. As to the admiralty jurisdiction, see *Le Caux v. Eden*,
Doug. 572.

(y) 13 Rep. 53 ; *Ridly v. Egglefield*, 2 Lev. 25 ; *Hardr.* 183.

(z) *Crosse v. Digges*, 1 Sid. 158.

(a) As to booty of war, vide *supra*,
p. 436.

(b) *Hale*, Hist. C. L. 36 ; *Co. Litt.* 11.

[crown and people. The first process in these courts is frequently by arrest of the defendant's person (*c*); and they also take recognizances or stipulation of certain fidejussors in the nature of bail (*d*), and in cases of default may imprison both them and their principal (*e*). They may also fine and imprison for a contempt in the face of the court (*f*). And all this is supported by immemorial usage, grounded on the necessity of supporting a jurisdiction so extensive (*g*), though opposite to the usual doctrines of the common law: these being no courts of record, because in general their process is much conformed to that of the civil law (*h*).]

Such in a general point of view is the nature of the jurisdiction and practice of the High Court of Admiralty, but it will be proper before we conclude to advert particularly to the specific regulations which have been recently introduced in reference to this subject by the act 3 & 4 Vict. c. 65.

The provisions of this act are chiefly as follows:—

1. That the Dean of Arches shall be assistant to and be competent to sit for the judge of the High Court of Admiralty in all suits and proceedings in the said court; and that the advocates, surrogates and proctors of the Court of Arches shall be competent to practise in the Court of Admiralty.

2. That whenever any ship shall be under arrest by process issuing from the High Court of Admiralty, or the proceeds of any ship having been so arrested shall have been brought into the registry of the same court, the court shall have jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship, and to decide any suit in-

(*c*) Clerke, *Prax. Cur. Adm.* s. 13. 260.

(*d*) *Ibid.* s. 11; 1 *Roll. Abr.* 531;
Par v. Evans, *Raym.* 78; *Degrave v.*
Hedges, *Lord Raym.* 1286.

(*e*) 1 *Roll. Ab.* 531; *God.* 193,

(*f*) *Sparks v. Martyn*, 1 *Ventr.* 1.

(*g*) *Pane (or Par) v. Evans*, 1
Keb. 552.

(*h*) *Bro. Abr. tit. Error*, 177.

stituted by any such person in respect of any such claims or causes of action respectively.

3. That the court shall have jurisdiction to decide all questions as to the title to any ship or the proceeds thereof in the registry arising in any cause of possession, salvage, damage, or bottomry, which shall be instituted in such court.

4. That the court shall have power to issue monition, and proceed in case of distribution of salvage, under the acts of 1 & 2 Geo. IV. c. 75 and c. 76, and shall also have authority to decide all claims in the nature of salvage, towage, or necessities, whether the service were rendered in the high seas or otherwise.

5. That in all suits the court may summon before it and examine witnesses by word of mouth, and either before or after examination by deposition or before a commissioner appointed by the court; and notes of such evidence shall be taken down by the judge or registrar or such other person as the court may direct.

6. That it shall be lawful for a judge or such commissioner to require the attendance of any witnesses, and the production of any deeds and other writings by writ in the nature of *subpœna*, or *subpœna duces tecum*, as used in her Majesty's Court of Queen's Bench at Westminster.

7. That in any contested suit the Court of Admiralty shall have power to direct a trial by jury of an issue on any question of fact, and that the substance of such issue shall be specified by the judge at the time of directing the same; and in case of dispute the form of it shall be settled by him, and the trial thereon shall be had before some judge of the superior court of common law at the sittings at *nisi prius*, or before some judge of assize, and a new trial may afterwards be granted on application of any of the parties within three calendar months; and farther, that the power of granting or refusing such issue or new trial may be matter of appeal to her Majesty in council.

8. That it shall be lawful for the judge of the Court of

Admiralty, subject to the approbation of her Majesty in council, from time to time to make such rules and orders respecting the practice of such court, and the conduct and duties of the officers and practitioners therein, as to him shall seem fit, and to repeal or alter the same.

9. That no action shall lie against such judge for error in judgment, and that he shall have all the privileges and protection which appertain to the judges of the superior courts of common law.

10. That the keeper of every common gaol shall be bound to receive and take into his custody all persons who shall be committed thereunto by the Court of Admiralty or by any coroner of the Admiralty.

11. That the judge shall have power to discharge any person in custody for contempt of the said court for any cause other than the non-payment of money.

Lastly, that the said court shall have jurisdiction to decide all questions concerning booty of war or the distribution thereof, which it shall please her Majesty to refer to the judge of the said court by the advice of her privy council, to be dealt with as in cases of prize of war.

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